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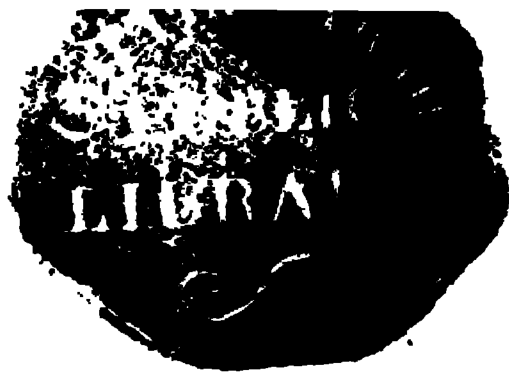
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THE

LAW MAGAZINE AND REVIEW.

No. CCLXX.—November, 1888.

I.—THE PRESENT POSITION OF THE *LEX LOCI CONTRACTÛS*.

MONTESQUIEU, in his *Lettres Persanes*, inserts a little apologue concerning the Troglodytes, a people who persistently ignored the sanctity of the Contractual relation, and in consequence, by a process of Natural Selection, which he does not specifically trace, perished utterly off the face of the Earth. Though the fable is hardly accurate historically, as indicative of the condition of Primitive Society, yet it points a moral, the magnitude of which in the author's time, and much more in the present age, cannot be estimated too highly. This importance of the idea of Contract, regarded especially from an International point of view, in these days of Steam and Electricity, of world-wide commerce and business complexities would alone amply justify the present Paper; but should any further apology be needed it may be found in the paucity of new works on Private International Law during the last decade as compared with the rapid development of the subject.

Indeed, it may probably be asserted without fear of exaggeration that in no part of the sphere of Municipal Law is to be found such a bewildering confusion of ideas, coupled with such a labyrinth of speculation, as in what is commonly known as "Private International Law,"—though more aptly termed by the majority of Continental and American writers, the "Conflict of Laws."

The confusion in modern times has arisen chiefly out of the antagonistic principles adopted by the two great competing Schools of Opinion, which may be conveniently termed the "English," or Anglo-American, embracing the chief Jurists of our own country, America, and those countries which stand in some sort of filial relation to Great Britain; and the "Continental," which derives its ideas in the first place from the Civil Law of Rome, and of which Savigny may be regarded as the main exponent.

On no one point is there to be found such a distinct joinder of issue between these two Schools as on that of the *Lex loci contractûs*. It would perhaps have been superfluous to enter into the discussion afresh, were it not a fact that on numerous occasions in recent years there has been a tendency traceable in the decisions of our own and Continental Courts, towards some degree of assimilation of principles and rules on the point in question.

To put the matter concisely, the moot point at the present time is simply as to what shall be taken to be the Law or Laws to which the various constituent elements of Contractual relations are referred, when considered as the subject-matter of an action in a Court of Law assuming jurisdiction over the case. It is obviously only in cases where there is on the surface some ground for referring the contract to more than one Law, and where such Laws conflict as to the principles applicable, that any real difficulty can arise.

The discussion of the subject is almost invariably rendered darker, and this without any necessity, by the confusion of the two ideas of the *Forum Contractûs* and the *Lex Contractûs*. This confusion is, as a matter of fact, based on historical grounds, but it is absolutely unnecessary and misleading in considering the question before us at present.

As was very clearly stated by a noble Lord, in a very recent case in the Upper House (*Cooper* v. *Cooper*, 13 App. Cas. 98), the question as to what *forum* can decide the controversy between the parties is a totally different thing from what law that *forum* shall administer in deciding it. The jurisdiction to try matters incidental to a contract is, primarily, entirely a matter for the determination of each separate State, and the mere fact of a State by reason of the powers conferred by the Rules of Practice of its own Courts of Law, affecting to have jurisdiction over the question, can obviously be of no use in determining by what Law the intrinsic validity of the Contract is to be governed, or indeed of settling what Law shall govern any of the adventitious elements of the obligation except the bare question of Procedure.

Savigny, however, gives some ground for the confusion of ideas by holding in very clear tones, in that eighth volume of his *System des Heut. Röm. Rechts*, which deals with the Conflict of Laws, that the laws which may govern the essential obligatory elements of a contract are precisely those pertaining to the States which may constitute the special *Forum Contractûs*.

It would be hardly necessary to recapitulate the rules of the great German Jurist in the present Paper, were they not the root of the whole System which is in conflict with that in vogue in our own country.

He says:—"I hold, without hesitation, that the whole series of practical rules, as they have just been laid down in regard to the special *fora*, also regulate the local law to be administered;" and he then proceeds to enumerate the various places to which, according to the varying circumstances attending the contract, the local law should be referred, *i.e.*:—

I. When the obligation has a firmly-settled place of fulfilment, to that place of fulfilment (*Lex loci solutionis*).

II. When the obligation has arisen out of a continuous course of business carried on by the debtor, to the chief seat of such business (*Lex sitûs*).

III. When the obligation has arisen from a specific act of the debtor at a place coinciding with his domicile, to such place (*Lex loci actûs*).

IV. Where it has so arisen from a specific act away from his domicile, but under circumstances which raise an expectation that the fulfilment is to be in the same place, to the place of such act.

V. In default of all these conditions, to the debtor's domicile (*Lex domicilii*).

The whole of Savigny's theory is a summing up of the principles which mainly prevailed during the Middle Ages, and which arose out of various passages (perhaps misconstrued) in the *Corpus Juris* of Justinian, especially the famous rule in the Digest, 44, 7, 2, "*Contraxisse unusquisque in eo loco intelligitur in quo ut solveret se obligavit.*"

Other extracts had been put forward by rival Jurists in favour of the *Lex loci celebrati contractûs*, which formed the chief opposing principle during the Middle Ages, and indeed at one time (during which it was imported into England, where it became the rule) threatened to supersede the former entirely.

The bearing of the above facts on modern ideas having, however, been elaborately summarised by Professor Westlake in the last edition of his work on *Private International Law* (London. 1880), it will suffice to mention briefly that the *Lex loci solutionis* was the principle which ultimately found more favour, except in France, where the *Lex domicilii* was paramount in every case until the Ordinance of Commerce in 1673, and even since then has been the primary rule applicable.

It is obvious, as has been observed by Westlake and other writers, that all Savigny's rules, in fact, converge

towards one point, *i.e.*, the law of the place of fulfilment (*Lex loci solutionis*) as the fundamental law governing the essential elements of a Contract; but I think we may go still further, and assert that, after all, it is the intention of the parties which is primarily looked to, whether expressed or tacit, and this it is which I wish to shew is fast becoming the universal primary criterion in all questions of this nature.

Underneath, however, lies the *Lex domicilii* as given in Savigny's fifth rule, and it is here that his theory is entirely at issue with that of the English School. The idea of Domicile is not indigenous to English Jurisprudence, and, as one of its constituent factors, is an importation from the Continent, and the *Lex domicilii* has never been recognised as a criterion in determining general questions of Contractual obligation, although in certain countries, especially in France, it has even now the paramount place.

As a matter of fact, there has otherwise been a manifest tendency in modern European Codes to depart from the strict lines laid down by Savigny, and the provisions of the Austrian and Italian Codes have made a considerable advance towards the adoption of the English *Lex loci celebrati contractûs*, and the ignoring of the *Lex domicilii* altogether.

Savigny's rules, in brief, stripped of their adventitious incidents, make the *Lex loci solutionis* (where there is a special place of performance fixed) the primary governing law—and only in default of this adopt the *Lex domicilii* (*i.e.*, of the person bound by the obligation). In more than one respect the English principles are directly opposed to these rules.

The presumption of the latter as to the law governing the essentials of a contract is, as will be presently shewn, in favour of the *Lex loci celebrationis* being taken as the *primâ facie* law applicable in default of evidence of a contrary intention.

No notice is in general taken of the *Lex domicilii*, although, as I shall point out later on, there have been some signs, in at least one recent decision, of a tendency in this direction. Subject to this, the intention of the parties is coming more and more to be recognised as the sole and absolute criterion. Before dealing with these points in detail, however, it would be well to clear the ground by shewing how far there is virtual unanimity among all writers and Courts on the subject.

To ascertain this, we may perhaps most conveniently, for practical purposes, split up the elements constituting or arising out of the Contractual relation into five distinct groups, according as we consider the transaction from the point of view of—1. Its *forum*. 2. The bare interpretation or construction of its terms. 3. The sanction by which it is enforced, and the nature of the procedure involved therein. 4. The legal capacity of the parties to enter into the contract. 5. The "Essentials" of the Contract, to use the term employed by Lord Campbell in *Brook* v. *Brook* (9 H.L.C. 173), meaning thereby the facts determining the intrinsic validity of the contract, and regulating the force of the obligation to which it gives rise,—in short, what Boullenois terms the "*Lien du Contrat*," or "*vinculum juris*." (Lib. 2, 46.) 6. Those derivative facts which are the necessary outcome of the obligation, and to which may be applied Professor Westlake's term "Adventitia of the Contract"—including therein all those incidents, called by Sir Robert Phillimore "Mediate and Immediate Effects," flowing from the nature of the contract and accidental consequences of the contract (*Commentaries on International Law*, IV., p. 523, Lond., 1874). On the first three of these, and to a great extent on the last, nearly all authorities are agreed, including such writers as Foelix, Savigny, Christinaeus, Mühlenbruch, Westlake, Story, Burge, Wharton, Phillimore, and Foote—

supplemented by a very large number of English, American, and Continental decisions which it would be superfluous to mention in any detail.

The elements causing the crucial difficulty are the fourth and fifth in the above category, *i.e.*, the capacity of the parties, and the "Essentials" of the contract. I propose to deal with these separately.

Firstly, as regards the Legal Capacity of parties to enter into a contract, the general Continental rule is to refer the question to the Law of the contractor's domicile. Savigny says [para. 374] :—"The personal capacity of the creditor or debtor in an obligation is not to be decided by the territorial law of the obligation as such, but only by the law which is in force at the domicile of the person;" and this is the generally accepted principle underlying the provisions of modern Continental Codes.

The English rule was not sufficiently clear, so recently as 1880, to allow Professor Westlake to arrive at any more definite conclusion than that "where the capacity of a person to act in any given way is questioned on the ground of age (para. 2, p. 43) or coverture (§ 3, p. 47), it is uncertain whether the solution of the question will be referred in England to the Personal Law." He then proceeds to sum up the case authorities on both sides, and considers them so far equal as to warrant his proposition.

Most other writers, however, of not less recent date, regard the balance as decidedly in favour of the *Lex loci contractûs* in all cases except that of marriage. The chief stumbling-block in the way of Westlake's dictum, that learned author acknowledges to be the decision of the Court of Appeal in *Sottomayor* v. *De Barros*, 3 P.D. 1, where the *dicta* are exceedingly wide and comprehensive; but Foote, Guthrie, and others think that they can hardly be allowed to counteract the otherwise overwhelming authority in favour of the *Lex loci contractûs*, and their opinion is in

conformity with that of the Divorce Court expressed in a further decision in the same case reported in L.R. 5 P.D. 94.

In the latter, the President, alluding to the *dictum* of the Lords Justices in the Court of Appeal, that "It is a well recognised principle of law that the question of personal incapacity to enter into any contract is to be decided by the law of domicile," said (p. 100) :—"It is of course competent for the Court of Appeal to lay down a principle which, if it formed the basis of a judgment of that Court, must, unless it should be disclaimed by the House of Lords, be binding in all future cases. But I trust that I may be permitted without disrespect to say that the doctrine thus laid down has *not* been hitherto well recognised. On the contrary, it appears to me a novel principle for which up to the present time there has been no English authority. What authority there is seems to me the other way."

Apart from the delicate question of weighing the relative value of the *dicta* of the Lords Justices, and the later opinion of the President of the Divorce Court, the previous Judicial authorities, as endorsed by so many writers, justify the proposition that at the date of the most recent text book the general rule was in favour of the Law of the place of contracting.

The best expression of this is to be found in the opinion of Cresswell, J., in *Simonin* v. *Maillac* (2 S. & T. 77) that "In general the personal competency or incompetency of individuals to contract, has been held to depend upon the law of the place where the contract is made."

Within the last seven or eight years, however, there have been cases which have undoubtedly been sufficient, if not to decide in favour of the *Lex domicilii*, at least to throw the whole question into confusion once more.

In *Lee* v. *Abdy* (17 Q.B.D. 309), the question at issue was, shortly, as to whether a woman domiciled at the Cape

Colony could recover as assignee of a policy of Life Assurance granted by an English Company to her husband, who was also domiciled at the Cape. Such an assignment was void by Cape Law, on the ground of the assignee being the wife of the assigner, but good by English Law.

The Divisional Court held that the Law of the Cape governed, and that, therefore, the assignment was void, but the Judgments are chiefly remarkable for the attention bestowed on the Domicile of the parties.

Counsel for the defendants argued that the whole point was one of the *capacity* of the alleged assignee, and must be governed by the *Lex domicilii*, *i.e.*, the status of the wife, which, by the Cape Law, prevented her being a party to the assignment.

Both Judges took the question of domicile into consideration, though whether with reference to *capacity*, or only generally, it is impossible to infer from the somewhat vague Judgments.

Day, J., said (p. 313), "The assignment was entered into in Cape Colony, and the parties were domiciled there;" and Wills, J., at p. 35, said, "The assignment is void—according to the place where it was made, and where the parties were domiciled."

By far the most important of the recent decisions on the point, however, is that of the House of Lords in the case of *Cooper* v. *Cooper* (13 App. Cas. 88), which may almost be regarded as revolutionising the existing Law on the subject. In this case, a domiciled Irishman married a domiciled Scotchwoman in Dublin in 1846. An antenuptial contract was entered into in Ireland between the two parties by which, in consideration of a provision made by her intended husband, the woman purported to discharge her legal rights of tierce and *jus relictae*. It was further agreed that they should reside, as they actually did reside during their married life, in Scotland. On the death of

the husband, in 1882, the widow sought to avoid the contract on the ground that, being an infant at the time of making it, she was incapable of contracting by the Law of Ireland. The House of Lords held that the capacity of the appellant to bind herself by the marriage contract must be determined by the law of her domicile, and that under such law she could not, as an infant, incur an obligation which was not shewn to be for her benefit, and that she was therefore at liberty to avoid the contract and claim her legal rights as a Scotch widow. The Lord Chancellor (Report, *Ibid.*, p. 99) said: "The capacity to contract is regulated by the law of domicile," basing this *dictum*, apparently, on what would seem to be a somewhat hasty generalisation of Story's rule as to the law usually governing questions of *status*, in § 64 of his *Conflict of Laws*, together with the vague opinions of certain Continental writers, such as Burgundus, Boullenois, D'Argentré, and Voet, as concurring in the maxim which, generally speaking, is undoubtedly true, "*Quando lex in personam dirigitur respiciendum est ad leges illius civitatis quæ personam habet subjectam.*"

Lord Watson (*Ibid.*, p. 105) notices the fact that in the present case the place of domicile and the *locus celebrati contractûs* being identical, the question of any conflict between the two as to capacity was immaterial; but he nevertheless shews a strong bias in favour of the *Lex domicilii* as an important factor in the case.

Lord Macnaghten, however, endorses the opinion of the Lord Chancellor in more or less distinct terms, at p. 108, where he says:—"It has been doubted whether the personal competency or incompetency of the individual to contract depends on the law of the place where the contract is made, or on the law of the place where the contracting party is domiciled. Perhaps, in this country the question is not finally settled, *though the preponderance of opinion here*

as well as abroad seems to be in favour of the law of the domicile."

In view of this important decision of the highest Tribunal in the United Kingdom, there can be no hesitation in saying that, even if we are not compelled now to regard the *Lex domicilii* as the absolute criterion of capacity to contract in all cases, at all events we must acknowledge that the *Lex loci contractûs* can no longer be regarded as the rule. As a matter of fact, it is scarcely likely that in a future case any lower Court would adopt a principle antagonistic to the above *dicta*, though some of these latter, especially that of Lord Macnaghten, with reference to the "preponderance of opinion" in this country, seem hardly borne out by a minute investigation of the facts on which they assume to be based.

It may be observed, in concluding this part of the subject, that their Lordships rejected altogether the matrimonial domicile (*i.e.*, Scotland) as a criterion of the law applicable, though hitherto the majority of English writers and cases have always attached considerable importance to it in questions of marriage settlements.

The Contractual element, however, over which there is the greatest difference of opinion, is undoubtedly that to which I have already applied the comprehensive term of "Essential," or what is called by Westlake the "Intrinsic validity and effects of the contract," considered apart from the other more adventitious elements.

There has always been considerable discussion in our own Courts as to the true law applicable to such cases, but the decisions may clearly be taken to have been on the whole in favour of the *Lex loci celebrati contractûs* as the *primâ facie* criterion, in preference to either the *Lex loci solutionis*, or the *Lex domicilii.*

Westlake says, "The dicta of the Judges, both English and American, are mainly on the side of the former (*Lex*

loci celebrati), which, at the time when the maxims of Private International Law were imported into this country, was almost universally preferred on the Continent under the influence of mistaken views as to the *forum contractûs* in Roman Law" (p. 234).

The intention of the parties, however, seems always to have been taken into consideration, though in many of the older decisions it is not expressly noticed.

It is this very fact which too often lent colouring to the rival claims of the *Lex loci solutionis* to be deemed the law primarily applicable, on the ground that there was always a tendency to regard the fact of a special place of performance being agreed upon by the parties as a tacit indication of their intention to contract with reference to the law of that place. Indeed, we may go still further, and submit that the adoption of the *Lex loci celebrati contractûs* at all was largely owing to the fact that in every case the law of England presumed, apart from express stipulation to the contrary, that the contract was to be performed at the place of making. In view of this double presumption, it is not difficult to account for the final adoption of the *Lex loci celebrati contractûs* as the law to be *primâ facie* applied in all cases. To the Judges, at the time, the latter merely appeared an extension of the Continental principle to suit English ideas, and not a direct antagonism to the latter.

Burge, III., 758, states this very clearly when he says that, "By the Law of England the place in which the contract is made is presumed to be that in which it is to be performed, unless the contract expresses that it is to be performed in some other place. Hence the law of the country in which the contract is made is that by which it is entirely to be governed unless its performance is to take place elsewhere."

So in *Andrews* v. *Pond* (13 Pet., 65), the Court said:—
"Contracts made in one place to be performed in another

are to be governed by the law of the place of performance." Up to this time it is observable that the mere fact of a place of performance having been fixed at all, was deemed sufficient evidence of the intention of the parties to have their relations governed by the law of the place of performance. The full transition to modern ideas was the rejection of this as an infallible criterion, and the adoption of the principle that to rebut the presumption in favour of the *Lex loci celebrati contractûs*, there must be a clear proof, over and above the mere fixing of a place of performance, that the parties intended to bind themselves by the *Lex loci solutionis*, or by some law other than that of the place of contract.

Lord Mansfield's Judgment in *Robinson* v. *Bland*, in 1760, (2 Burr., 1078), may be regarded as the final settlement of the question on this basis: "The law of the place can never be the rule when the transaction is entered into with an express view to the law of another country as the rule by which it is to be governed." From that time down to the date of the most recent text books the tendency of decisions was to make this principle clearer and more uniform, and the judgment in the case of *P. and O. Company* v. *Shand* (3 Moo. P.C., N.S. 290), in 1865, is that which has been taken by most recent writers as the final summary of the correct rule as it existed at the date at which they were writing. In the recognition of this principle of a presumption in favour of the *Lex loci celebrationis*, rebuttable only by proof positive of a contrary intention of the parties, most English and American writers of recent years have concurred, including Westlake, Foote, Guthrie (the learned editor of the English Edition of Savigny's work), Story, and the late Sir Robert Phillimore, in works published in or before 1880. Wharton is, perhaps, the one exception in the Anglo-American School. In his work on *Private International Law*, published in 1881, he adopts

Savigny's remark, that "the place where an obligation originates is often accidental," and holds that the place of performance is the best criterion of the law applicable, unless there is an express intention to refer the case to the *Lex loci celebrati.* This is the exact converse of the principle advocated by all the above Jurists, and can hardly have much weight against such an overwhelming mass of authority.

Wharton (p. 464), it may be observed, seems to make a somewhat unfair use of a remark of Westlake, where the latter, speaking of marriage settlements, says:—"The common personal law of the parties is a safer guide than the law of a merely casual place of contract" (Westlake, *op. cit.*, p. 67). But it is obvious here that the author bases his statement on the fact, ignored by Wharton, that he is dealing with the peculiar case of contracts made in connection with Marriage.

Sir R. Phillimore, in paragraph DCLXXV. of his *Commentaries*, says:—"As to the place of contract, the presumption is, in the absence of express declaration or strong counter-presumption, that the parties intended to observe the law of the place where the Contract was made." In this statement he attaches a due importance to the question of intention; and, though expressed in more moderate terms than Westlake employs, it presents, I venture to think, a truer estimate of the then existing law. Westlake appears to go further in this respect than—at that date, at all events—he was justified in doing, though eventually he sums up his views, after a review of the cases, in the very indefinitely-expressed rule that, "Under these circumstances, it may probably be said with truth that the law by which to determine the intrinsic validity and effects of a contract will be selected in England on substantial considerations, the preference being given to the country with which the transaction has the most real connection, and not to the place of contract as such."

That cautious Discretion which would avoid compromising itself by an excess of exactitude could hardly be better exemplified than in the wording of this rule (if rule it can well be called); but the very indefiniteness of the latter renders it almost valueless for practical purposes.

One thing is clear, viz., that the author certainly does not give sufficient weight to the *Lex loci celebrati contractûs*.

Before taking a final review of the question in the light of decisions which have been given since the publication of the last authoritative text book on the subject, it would be advisable to recall the fact that, to whatever extent we may enunciate any particular rule as generally applicable, there are various classes of cases which have, at the present time, acquired the right of being regarded as distinct and legally established exceptions governed by distinct rules and principles. All of these, as a matter of fact, to use Mr. Justice Willes's words (*Lloyd* v. *Guibert*, L.R. 1 Q.B. 122), "appear to be exceptions to the more general rule by reason of the circumstances indicating an intention to be bound by a law different from that of the place where the contract is made." The question of intention has now, however, too frequently got to be lost sight of in the legal presumption to which it has given rise.

Briefly enumerated, with regard only to expediency and not to logical classification, these cases are as follows:—

(*a*.) Contracts regarding immoveables must always be amenable to the *Lex sitûs* to any extent to which the latter conflicts with other laws—and the rule may be applied even to certain cases where the subject-matter, though not an immoveable, is distinctly and solely local in its nature.

(*b*.) Contracts which are to be performed in England, and the performance of which is illegal by the Law of England, will not be enforced in our Courts; and the same rule applies to certain indefinite cases where our

Courts deem that the contract to be enforced conflicts with public or moral interests.*

(*c.*) The case of Bills of Exchange, so long a stumbling-block in Judicial Decisions, is settled now to be governed by its own peculiar rules, owing to the unique negotiable nature of the subject-matter of the Contract. Some of these rules conform to principles more generally applicable, and the provisions of the Bills of Exchange Act, 1882, tend considerably to settle the question on a basis very much in harmony with these general principles. (Sec. 72, and see *In re Marseilles Extension Ry. and Land Co.*, L.R. 30 Ch. D. 598, and *In re Boys*, 33 Ch. D. 620.)

(*d.*) Contracts arising out of, or connected with, the *status* of Marriage, as has been already frequently observed, constitute in many respects an exception.

Finally, there are two classes of contracts which are exceptions peculiarly on the ground that the intention of the parties is presumed in such cases to be in favour of a law other than that of the place of contract: *i.e.*,

(*e.*) Contracts of Affreightment — including Charter-parties, Bottomry Bonds, etc., which are referable *primâ facie* to the law of the country of the ship's flag,* and

(*f.*) Questions arising out of the Quasi-Contract of General Average, which are governed by the Law of the Port of Destination.

It would be a work of supererogation to enumerate cases regulating these exceptions, but as regards the last two, the whole question was reviewed in all its aspects in the great case of *Lloyd* v. *Guibert*, L.R. 1 Q.B. 115. Here Mr. Justice Willes, in delivering the Judgment of the Court (of six Judges), after referring to the general rule

* [It may be well to note that the Resolutions of the Maritime Law Section of the International Congress on Commercial Law, opened in Brussels on 30th September last, recommend the Law of the Flag as that to be adopted in the class of cases cited above.—See *Belgian News*, Brussels, Oct. 13th, 1888.—Ed.]

that the law of the place where the parties contracted was *primâ facie* that which they intended to adopt, said, that "such law ought, therefore, to prevail in the absence of circumstances indicating a different intention, as, for instance, that the contract is to be entirely performed elsewhere, or that the subject-matter is immoveable property situate in another country and so forth." He then argues that the parties clearly intended, and must be presumed in all cases of Affreightment contracts to intend, to be bound by the law of the ship, such presumption being "most consistent and intelligible, and, therefore, most convenient to those engaged in commerce."

There have been several very recent decisions supporting this Judgment, to which I shall have occasion very soon to refer.

It is worth noting, in passing, that much of the confusion on the present subject arises from the application of the term *Lex loci contractûs* to cases both of the *locus celebrationis* and the *locus solutionis*. Westlake and Wharton both remark upon this fact as tending greatly to obscure the point at issue.

In order to obtain a clear idea of the exact state of the question at the present day, a careful consideration of the decisions of the eight years which have elapsed since the publication of the latest work on the subject is necessary.

Such of these cases as are reported are not numerous, but are exceedingly important. Their main tendency is to lay more and more stress on the *intention* of the parties; to refer to it wherever it is clearly expressed; and, where not so expressed, not to be content with merely falling back on the presumption of the *Lex loci celebrati*, but to endeavour to extract the intention from a minute examination of all the circumstances surrounding the contract.

"In such a case . . . . the only certain guide is to be found in applying sound ideas of business convenience

and sense to the language of the contract itself with a view to discovering the true intention of the parties. . . . . . Stereotyped rules laid down by juridical writers cannot be accepted as infallible canons of interpretation in these days when commercial transactions have altered in character and increased in complexity, and there can be no hard-and-fast rule by which to construe the multiform commercial agreements with which in modern times we have to deal" (Bowen, L.J., in *Jacobs* v. *Crédit Lyonnais*, 12 Q.B.D. 601).

In *The Gaetano and Maria*, 7 P.D. 137, the Court of Appeal, over-ruling the judgment of Sir Robert Phillimore, held that, upon principle, he who ships goods on board a foreign vessel is presumed to ship them to be dealt with by the master according to the law of the country of such ship, unless there is a stipulation to the contrary, and incidentally, Cotton, L.J., points out one of the great fallacies in the adoption of the *Lex loci solutionis* as the primary criterion. He says: "It was said . . . . that where the contract is made in one place to be performed in another, the law of the place of performance was to govern. Here the place of performance was said to be England because the goods were to be carried there. But this really is a fallacy. The performance of the contract is not merely the landing of the goods in England. They are taken on board to be ultimately landed, no doubt, in England; but what law of the numerous countries to which the goods may be taken during their carriage to England is to be implied?" (*Ibid.*, p. 149.) This strikes the keynote to an argument against the *Lex loci solutionis* which may be extended much further. It would apply to every bilateral contract, and, generally speaking, almost every contract is *bilateral* as considered in the Courts of a country like our own, in the law of which the doctrine of Consideration plays so vital a part. Wherever money is to be paid, or something by way of consideration is to be done or not done in return for the act or forbearance agreed

upon, there is the possibility of two or more places of performance co-existing, *i.e.*, one for each party to the contract. It is not rash to submit that probably this fact more than any other prevented the adoption of the *Lex loci solutionis* in English and American Courts.*

In a case decided in February, 1888, and reported in the *Times Reports*, IV., p. 367, and also in 58 L.T., p. 377, *In re Missouri Steamship Company*, Chitty, J., in an action on a contract of Affreightment, reiterated the rule that the Law of the Flag applied on two grounds :—1. On the general rule in *Lloyd* v. *Guibert*, etc., and—2. On the particular ground of the intention of the parties to that effect, as deduced from the specific facts proved.

There has been one instructive case which bears out in a remarkable manner the universal dominance of the Intention, by holding in an action on a Bill of Lading that, although the Law of the Flag in Affreightment Contracts *primâ facie* governed, yet the intention of the parties being obviously in favour of the *Lex loci celebrati*, this latter must be deemed to be the law applicable to the specific case. Lindley, L.J., said, " The inference is very strong that the parties intended to contract with reference to English Law." (*Chartered Mercantile Bank of India, etc.*, v. *The Netherlands India Steam Navigation Co., Ltd.*, L.R. 10 Q.B.D. 540.)

Of the few cases on general contracts which deal with the point at issue, one particularly is of supreme importance, and may be regarded as the completest and clearest statement of the present position of the *Lex loci contractûs* which we now have, viz., *Jacobs, Marcus & Co.* v. *The Crédit Lyonnais* (L.R. 12 Q.B.D. 589), decided by the Court of Appeal, in 1884.

In this case the defendants, a London firm, contracted in London to sell to the plaintiffs, merchants, also carrying

* Cf., in this connection, the judgment of the Divisional Court in *Robey and Co.* v. *The Snaefell Mining Co., Limited*, L.R. 20 Q.B.D. 152.

on business in London, 20,000 tons of Algerian esparto to be shipped by a French Company at an Algerian port. The defendants failed to deliver 11,000 tons on account of the prohibition by the constituted authorities of the export of esparto from Algeria by reason of an insurrection and consequent hostilities in that country.

In an action for breach of contract defendants pleaded that they were excused from performance if prevented by "*force majeure*," which plea was good by the French Law of Algeria.

The Court of Appeal, consisting of Brett, M.R., and Bowen, L.J., affirming the Judgment of the Divisional Court, held that the question not being merely one of the method of performance, but one essentially touching the root of the Contractual obligation, must be referred to the general principles governing the latter, viz., the *Lex loci celebrati contractûs* (English Law) by which the defendants were liable. The Judgment, already referred to, of Bowen, L.J., may be regarded as settling the question for the present. His Lordship laid down that to ascertain what was the law applicable, we must first turn to the contract itself. "Certain presumptions, or rules, have been laid down by juridical writers of different countries, and accepted by the Courts, based upon common sense, upon business convenience, and upon the comity of nations; but these are only presumptions or *primâ facie* rules that are capable of being displaced wherever the clear intention of the parties can be gathered from the document itself, or from the nature of the transaction. The broad rule is that the law of a country where a contract is made presumably governs the *nature* of the obligation, and the intepretation of it, unless the contrary appears, from the express intention of the parties." (Report, *u.s.*, p. 600.)

He then proceeds to notice a point which had previously been casually observed upon by Willes, J., in *Lloyd* v.

Guibert (*u. supra*) :—" In most cases, no doubt, where a contract is *wholly* to be performed abroad, the reasonable presumption may be that it is intended to be a foreign contract determined by foreign law" (p. 601), meaning, apparently, that the inference in such a case would be so strong that this was the intention of the parties as to reasonably weigh against the presumption of the *Lex loci celebrati contractûs.*

Further on, Lord Justice Bowen calls attention to the various circumstances shewing that the intention of the parties was in favour of the last-mentioned law, especially the fact that the contract was one between merchants resident (at least in a commercial sense) in London, and that payment was to be made in London, and other points which were not counterbalanced by the mere fact that the contract was to be partly performed in Algeria. On these grounds Judgment was given for the plaintiffs.

There have been a few other noteworthy decisions prior or subsequent to this case, but these were all either reviewed in or based on the latter.

It is necessary, however, to make one observation, evoked amongst other things by the Judgment previously alluded to in *Lee* v. *Abdy* (17 Q.B.D. 309), where both Judges in the Divisional Court lay stress on the parties being domiciled in the place of contract. It is true that if the question be regarded, as Counsel for the Defence contended, as one of Capacity or Status, the point might have been urged with at least some degree of force, but this was clearly not the light in which the Court viewed it in giving Judgment.

If, after the review of these recent authorities, we compare the principles deduced therefrom with those advocated by writers of the Continental School, such as Savigny, and better still with those adopted in many of the European Codes, there seems to be no difficulty in arriving at certain

definite conclusions, which may be reduced concisely into the form of the following propositions :—

(*a.*) As regards the law determining the general capacity of a person to contract, the Continental rule is still almost invariably in favour of the *Lex Domicilii*, and in our own country there has recently been evinced, on the part of the highest Judicial authorities, so decided a tendency towards adopting the same principle as to perhaps compel us to regard the old rule of the *Lex loci celebrati contractûs* as altogether superseded.

(*b.*) As regards the Intrinsic validity of a Contract, at the present time, there is a tendency strongly manifest in the rules adopted by all countries and authorities towards an assimilation of principle based on the paramount importance of regarding the Intention of the parties as the main consideration; and, in order to arrive at this intention, every possible circumstance connected with the Contract must be carefully scrutinised and considered, in the abcence of express declaration.

(*c.*) Apart, however, from any such criterion of Intention, the presumption in English Law is undoubtedly in favour of the *Lex loci celebrati contractûs;* that of the Continental School of Jurists is in favour of the *Lex loci solutionis;* but in recent years there has been, in fact, on the Continent a perceptible tendency towards the substitution of the *Lex loci celebrationis.*

(*d.*) A slight inclination, though perhaps hardly sufficient to merit attention here, is traceable in several very recent English decisions, to take notice of the domicile of the parties in determining the intrinsic validity of the Contract.

Further than this we cannot at present go. The chaos of conflicting opinions to which it was formerly necessary to refer questions arising out of Private International relations has indeed been reduced to something like order, or, at least, intelligibility. It would be rash, however, to

expect, and perhaps as yet even to hope for, perfect unanimity of Thought and Practice. To attain such an ideal state of things, we must be content to wait patiently for that shadowy Future when the dreams of Kant and Bentham are realised in some "Parliament of Man" of which at present only poets dare sing.

JOHN M. GOVER.

II.—WENDT'S MARITIME LEGISLATION.

THE new edition of Dr. Wendt's valuable book* seems to call for more than a passing notice in these pages, if for no other reason than to recognise what the persistence and zeal of even one man may do in a cause. Probably no one has or takes anything like the same interest in favour of the Codification of the Laws of General Average and Affreightment as Dr. Wendt himself. And whilst a large portion of those interested in the matter, in this country at all events, are actively opposed to any change at all, there is in addition that tremendous *vis inertiæ* of the timid and indifferent which has preserved the form of the Lloyd's Policy, and of the basis of Bills of Lading practically intact for centuries, though many of the expressions of the former document have become meaningless; and the latter is, like one of Pharoah's lean kine, eaten up by the exceptions which have grown upon it. Neither active opposition nor passive resistance, however, have any effect on the energy of Dr. Wendt. If the Board of Trade and its myrmidons shew the cold shoulder to his proposals for altering the law of England, he turns to International

* *Papers on Maritime Legislation.* With a Translation of the German Mercantile Laws relating to Maritime Commerce. By E. E. WENDT, D.C.L. Third Edition. Longmans. 1888.

Law Congresses. Armed with their approval, he returns to the charge, and memorialises members of both Houses and the Lord Chancellor, and again and again gets his views adopted by a larger and yet larger circle of those interested in Commercial affairs, both in their Juridical and practical aspects. Such a striking example of energy and untiring perseverance does he shew, that it calls out the admiration of even so disinterested a spectator as the late Archbishop of Canterbury, to such an extent as to lead him to make an unusual exercise of his prerogative by conferring on Dr. Wendt the degree of D.C.L. for his services to Maritime Legislation.

Whatever may be the varying opinions as to the remedy, there can be but one opinion as to the evils of the existing state of things in respect to the questions principally dealt with. These are (1) General Average (pp. 1—294): (2) Affreightment (pp. 295—512): (3) the Limitation of the Shipowner's Liability, on which subject we may refer our readers to an article in these pages,* and which, in the form of a remonstrance against the Judgment of the Judicial Committee of the Privy Council in the case of the *Marie de Brabant* (pp. 513—526), and again in discussing the Merchant Shipping Acts at (pp. 610—619), occupies considerable space in Dr. Wendt's book: (4) The question of the incidence of Damage arising from a collision at sea when both vessels are to blame,† and which is one of the questions discussed at the International Congress on Commercial Law, convened at Brussels, under the auspices of the King of the Belgians, and still in session whilst these pages are being written: (5.) The incidence of Damage when a vessel is in charge of a

* *Law Magazine and Review*, No. CCXLIX., for August, 1883.

† Some observations on this point will be found in the *Law Magazine and Review*, No. CCLXVII., for February, 1888, in the Notes to the Articles of the Italian Commercial Code dealing with the subject.

Pilot by compulsion of law; and his negligence or incapacity causes damage to another vessel. With this last subject Dr. Wendt deals in his observations on the Merchant Shipping Acts, at pp. 570, 583, and apparently his views on the subject are unchanged since he brought out his 2nd Edition in 1871. He makes no reference to the Report of the Committee which has been sitting to consider the subject during the present year; probably that Report was not published when the book was ready, or, at all events, printed. In all matters of Maritime Legislation, Dr. Wendt is an able and persistent exponent of the views of that school which perhaps we may be allowed to call the Continental, or Code-educated school, who desire to bring about uniformity of practice by the compulsion of law, in contradistinction to that which, with the same margin, we may call the Insular, or Independent Law School, who think it is better to leave parties to contract with one another as they will, so long as their contracts are not contrary to public morality, or to the welfare of the State or individuals. No doubt the former plan has the advantage of simplicity, as, were it carried out in its entirety, and made a rule of International or Treaty Law, it would only be necessary to take a receipt for goods loaded, or premiums paid, to ensure that all the legal results of the uniform Bill of Lading and Policy of Insurance should follow. Whereas, under the latter, a shipper must take the trouble to read through the terms of the Bill of Lading, the assured, previous to his entering into that condition, must consider the terms of a proposed Policy, to know, what the shipowner or insurer will be liable for, and what will remain at the risk of the shipper or assured, and to bargain for any proposed alteration, and, in the event of the contract of affreightment or assurance being entered into in a foreign language, to have it correctly interpreted. A slight slip in the translation of the French word *demander* once nearly caused a suspension of Diplomatic

intercourse between the United States and France, and a similar slip with regard to the word *déposer* is believed to have caused endless complications in Egypt between France and England. Therefore it will be seen that a small error may easily lead to an adverse decision of a Law Court. But, on the other hand, it may perhaps be urged that, under the latter system, the commerce of this country has increased in a more rapid ratio and to a far greater extent than that of any Continental State under a rigid Code, and this cannot be ascribed to any special Anglo-Saxon peculiarities, as the number of Foreigners carrying on prosperous businesses (amongst whom, we believe, might be specially mentioned the firm of the author of the *Papers on Maritime Legislation* now before us), under our laws in our own country testifies. The enormous advantage, however, of having one uniform Law of the Sea probably more than counter-balances any disadvantage that either of these systems may have with regard to the other, and as it is as improbable that all nations will, at the bidding of certain British subjects, lay aside their Codes as that they will lay down their arms, it is probably only practicable to arrive at the desired uniformity by assimilating and adopting an International Code. Though, with Ireland in hand, and Wales and Scotland waiting, it is doubtful if Parliament will find time to adopt even the best and most matured scheme arrived at by International Congresses. To shew the difficulty of drawing up any such Code, it may be perhaps sufficient to draw attention to one example.

Rule VI. of the York and Antwerp Rules, "Carrying Press of Sail," which was adopted *nemine contradicente* (Wendt, *op. cit.*, p. 229), is in the following terms: "Damage occasioned to a ship or cargo by carrying a press of sail shall not be made good as General Average." Now this would, as it stands, express the English law as well as that of probably most Foreign countries, but a question would

very soon arise whether damage done to ship and cargo by carrying what the Americans call full head of steam in a steamship was covered by the article, on the principle of *cy près*, or not. And it is not much of a guess to hazard that the English and Continental Courts would take different views of the matter, the former looking to the probable intentions of the parties, the latter to the hard and fast rule of the Code. Nevertheless, whatever views any person interested in these important subjects of General Average and Affreightment may take, all must feel indebted to Dr. Wendt for his laborious compilation of all that has been said and done on the subject during a period of nearly 30 years.

In dealing with the English Law of Limitation of a shipowner's liability, Dr. Wendt gives some very interesting information with regard to what took place in the House of Commons when the Merchant Shipping Act Amendment Act, 1862, was under discussion, and especially quotes from Hansard (see p. 612) a very weighty sentence of Lord Palmerston on the subject. It may be doubted, however, whether a law like ours, limiting the liability for damage to a certain sum per ton of the wrong-doing vessel's tonnage, which, however illogical, at all events, gives the person wronged some remedy, be the wrong-doing vessel never so small, is more unjust than the General Code Law of the Continent, limiting the liability of the owner to the value of the actual instrument with which the wrong is done after that wrong is completed, so that if the wrong-doing ship only hits the other so hard that she herself goes to the bottom, the person wronged has absolutely no remedy, inasmuch as to abandon to him a vessel sunk full 50 fathoms deep, or possibly five miles deep, in the Atlantic, and freight which has not been earned, sounds very like a *mauvaise plaisanterie*. If any limit at all is to be placed on the liability of a ship-owner for acts of his crew to which he is not privy, and

which he has no means of preventing, it should surely rather bear some relation to the size, and, therefore, approximately to the probable value of the vessel injured than to that of the vessel doing the injury. Though agreeing generally with the observations on our Admiralty procedure, both in the High Court and County Courts (pp. 621—626), we cannot admit that the former would be improved by reserving it exclusively for one Judge. For the whole Maritime Law of the Kingdom to depend on the views of one man is almost tempting Providence, especially after the exceptional good fortune of the English Court of Admiralty in being presided over by such men as Lord Stowell and Dr. Lushington for remarkably long periods, and being now fortunate, in an equally exceptional degree, in two Judges, whose duplicate position is necessary at times for that rapid decision of cases which has always been the boast of the Admiralty Court. As to the County Courts, whilst quite agreeing that it would be better for the suitors if there were Vice-Admiralty Courts in the principal out-ports, presided over by Judges with that special knowledge which cannot be expected from a County Court Judge, however good a general lawyer he may be, unless he has had special training in the matter, we fear that the idea of establishing such tribunals can only be considered what Theologians term a "counsel of perfection." It is extremely unlikely that any pay, such as would probably be attached to an office of this kind, would draw men away from lucrative practice in the High Court; and if the appointments were held by practising barristers, like Recorderships, difficulties would arise and dissatisfaction be felt both by the Judges and parties, as has ever been the case where the Judge of to-day is the counsel of to-morrow, very likely for one of the parties who have just been before him in his Judicial capacity. Perhaps something might be done by giving the Wreck Commissioner a limited Civil

jurisdiction, in addition to the special duties hitherto attending to the office, and allowing him to sit in Admiralty cases at any of the principal sea-ports, with power to refer accounts, &c., to the Registrar of the County Court in the place. We should observe that this reference, on which Dr. Wendt rightly lays so much stress (p. 622), cannot, under existing Acts, be made *ipso motu* by the Judge of a County Court, but requires the consent of the parties, who practically constitute the Registrar or some one else an Arbitrator. We remark a printer's error in the note on this page: the ship's name should be *The Alina*, and the reference 4 M.L.C., N.S. As the full reference is *The Russian ship Alina*, the substitution of *Alma* in that connection was probably a joke of the printer's! Passing from these subjects, we are glad to reach one where we can cordially agree with every word the author says, in his desire to make what one may call maritime fraud, like actual piracy, justiciable anywhere. No one can go through the string of cases given by Dr. Wendt, many of which came to his personal knowledge (and to his probable loss as agent for Underwriters), without saying how many of those most wicked acts, in several cases involving not only loss of property but loss of life, must, under existing circumstances, go unpunished. We may add to Dr. Wendt's list a still more recent case, which we extract from the *Nautical Magazine* for June, 1888, p. 470, "The villainous master of the *L. E. Cann*, and the still more villainous Campos, who was to share the plunder, but not the actual risk attendant in casting away the ship, are found, one in Mexico and the other in the United States. They have conspired to defraud—the actual conspiracy being in the territory of Mexico. The master, in pursuance of the fraud, has committed the further offence, criminal in Great Britain, of casting away a British ship on the High Seas,"—the ship itself belonging to Nova Scotia—"but

where and how is this case to be tried? And how do Extradition treaties and the Merchant Shipping Acts affect it? It is probably sufficient to point out the difficulties in this case to shew that Justice is likely to be not only blind, but deaf and lame as well; and that to enable her to overtake the guilty, it is highly desirable for the Maritime Nations to mutually agree on some plan by which offences committed on and concerning the High Seas shall be, like open piracy, justiciable anywhere, such persons as the master of the *L. E. Cann* and Sr. Campos being more truly *Hostes humani generis* than most of those who, in times gone by, have swung in chains at Execution Dock, or hung from many a gibbet ashore and yard-arm afloat."

We may also cordially agree with Dr. Wendt as to the desirability of some improvement in the making and keeping of ships' papers. In most countries, the log is an official document, either obtained from a Government officer, or at all events, paged and paragraphed officially, and officially presented, and receiving an official *visa*, on arrival in port, by a Government official. It ought to be either written up continuously in the remark column or the *lacunæ* marked when the *visa* is given, but, even if this is not strictly attended to, the system prevents words already written from being tampered with, though possibly new words may be added. In British ships, the Official log contains nothing except certain entries required by Act of Parliament, and for the particulars of, say a collision or a stranding, we have to fall back upon the Ship's log, which is, after all, a mere journal, voluntarily kept by the chief officer, or sometimes, in large vessels, the second officer, and which very probably is never seen by anyone but the person who has written it until its production in Court; there seems no reason why the two logs should not be amalgamated and treated as they are in foreign ships. Passing over the objections of the author to the double appeal,

given in Admiralty Clauses for the first time by the Judicature Acts, in 1873, as being now, after an experience of fifteen years, too well fixed to be likely to be altered, we come to the Appendix, containing the German Law of Maritime Commerce, which is the portion of the book certainly of the greatest practical use to the Legal Profession. We are not aware of any other English translation of this part of the German Code, and feel sure that none could be better done. From the familiarity of the author with both languages, and that not only in their ordinary use, but also in the crooked byeways of both Legal and Nautical terms, the translation is both exact and fluent, and we only regret that it is not compared with other Codes, and with English Law in the same manner as the Codes of Maritime Law now appearing in this *Review*. It will be impossible for any future translator, if his translation is good, to avoid in some degree the imputation of plagiarism, and, unfortunately, that imputation will deepen and broaden as his translation approaches perfection, until, when complete, it will be merely a *verbatim* copy. We observe that Dr. Wendt has felt the same difficulty about the translation of the word *verfrachter* (p. 712, note) that has been pointed out in our latest volume,* with regard to its equivalent expression in Italian, and other European languages. It certainly is strange that a language like English, drawn from both German and Latin sources, and used by the greatest Commercial nation in the world, should have no simple expression for this personage. "One who lets the vessel" sounds more like a blood-curdling epithet from one of Mr. Rider Haggard's works than a term for general use in either Law or Commerce. If it is permitted at all to criticise so admirable a translation, we may venture to express a doubt whether *vis major*, which is a well-known

* *Law Magazine and Review*, No. CCLXVI. November, 1887, p. 65.

expression, though not exactly a term of English law, is quite rendered by our law term, "The act of God" (see p. 721, Art. 607; and see a discussion on this point at p. 374); and we think it will appear from comparing decisions of foreign Courts, where it is in use as a term of law, that it has a much wider signification. Thus, *e.g.*, a vessel already dismasted is driven ashore and lost; we think any foreign Court would find this stranding the result of *vis major*, but we do not think any English Judge would hold that it was the Act of God in the legal sense, though it might or might not be the result of a "peril of the seas." In conclusion, we can only add that Dr. Wendt appeals, and we hope will appeal successfully, to two classes of readers—in the body of his book, to Merchants, Jurists, and Legislators, shewing them what has been done and is being done, and the existing condition of the Law on many disputable points, stating his case for alterations clearly, and with a force seldom found in legal works—and then, in the Appendix, giving the practising Barrister, engaged in Maritime affairs, an admirable and most useful translation of the German Code, which will become daily more useful with the increase of German Commerce, until the dawn of that legal Millenium for the Civilised World, which Dr. Wendt is so anxious to bring about, but which would probably not be by any means an "age of gold" for the lawyers, when all Commercial transactions shall be governed by a Common Law of the Sea.

III.—FOREIGN MARITIME LAWS: II. ITALY.

MERCANTILE MARINE CODE.

CHAPTER II.

Of the Police Regulations for the Administration and Safety of Seaports.

ART. 163. The Port officers provide places within their jurisdiction for maritime service, and regulate and superintend—

(*a.*) The entry and clearance of ships.
(*b.*) Anchorages and moorings.
(*c.*) The embarkation and disembarkation of passengers.
(*d.*) The loading and discharge and storing of goods and ballast.
(*e.*) The use of fire and precautions against fire.
(*f.*) Everything connected with the police and security of the harbour and roadstead and their appurtenances.

The extent of the control of the Port officers within docks will be determined by the acts of concession and special regulations.

In towns and maritime stations which communicate with the sea by canals or navigable rivers, the limits of the places subject to the Port officials will be determined by agreement between the Captain of the Port of the Department and the Town Council of the place concerned, and if they cannot agree, then by mutual reference, to the Minister of Marine and the Minister of the Interior.

In England the powers of Harbour Authorities are regulated by the private Acts under which they exist, and the general powers of the Harbours, Docks, and Piers Clauses Act, 1847.

164. Landing-places, slips and piers which are the terminus or branch of a railway, are under the jurisdiction

of the Port officers, and the Road authority cannot interfere in such places, except in matters which concern the working of the Railway.

165. In ports where sheers, cranes, or other mechanical contrivances for the loading and landing of goods have been placed on landing places, slips, or piers by the Corporation or Chamber of Commerce, or others, the working of such machines must be regulated with the consent of the Port officers, in whom is vested the police superintendence both of the machines and of the persons appointed to manage them.

Cf. Harbours, Docks, and Piers Clauses Act, 1847, §§ 21, 22.

166. All persons employed in nautical affairs, ballastmen, interpreters, and bumboatmen, whilst at work in harbours, or the seashore, or in basins or cuts, are subject to the local Maritime authority, and bound to observe the Regulations which relate to them.

167. No boats or other vessels, excepting pilot boats and tugs, are permitted to communicate with ships which come into harbour before the latter have complied with the formalities laid down by law as to health and public safety.

No person is allowed on board a British ship, except by leave of the master, before the seamen are discharged (Merchant Seamen, Payment of Wages Act, 1880, § 5), and this law can be extended to foreign ships by Order in Council in cases of reciprocity, by § 6 of the same Act.

168. Vessels must not come into the inner ports and moorings before discharging gunpowder and landing fire-arms that are on board, except in case of necessity, when the fact must be immediately declared.

Captains who desire to load or discharge goods of an inflammable nature, must give notice at the Port office, so that precautionary measures may be taken.

In case of fire in harbour, or on the quays, or the neighbouring parts of the town, captains of ships must collect

their crews and carry out all instructions that may be given by the Maritime authority.

Under the Harbours, Docks, and Piers Clauses Act, 1847, § 71, no gunpowder is allowed on board except by permission of the Harbour Master, and by § 5 of the Explosives Act, 1875, not more than 30 lbs. of gunpowder can be kept in one place, but by § 101 of the Act, the means of making the signals required by Sect. I. of the Mer. Ship. Act, 1873, and § 21 of the Mer. Ship. Act, 1876, appear to be exempted from this regulation, the original rule as to these signals contained in § 301 (4) of the Mer. Ship. Act, 1854, being repealed by the Schedule to the Merchant Shipping Act, 1876.

169. The (Port) regulations will make all provisions in respect to moorings for ships, landing places, ballast, the use of fire, and in general for the safety and police of anchorages.

170. In case of necessity, or when orders given are not obeyed, the Port officials can make vessels moor or unmoor on their own authority, or increase their moorings, or carry out any other necessary manœuvre at the expense of the ship.

The Port officers may even, in a case of extreme urgency, without other form than a second verbal order, cast off the moorings of a ship which the crew have refused to veer.

Similar powers are conferred on Harbour Masters by the Harbours, Docks, and Piers Clauses Act, 1847, §§ 52, 53, 58, 65, and 71.

171. Whenever a ship has no crew, she must have on board a watchman over 21 years old.

Ships which are at anchor in tiers, or in the vicinity of piers, or in other places where it may be necessary to veer the moorings, must always have on board the number of persons required to carry out this manœuvre.

172. Ships, both on arrival at, and departure from, a port or shore of the State, must show their colours.

By the Queen's Regulations for the Navy, Men-of-war have to hoist the colours when getting under way and coming to, if there is light enough to see them; but there is no such regulation for Merchant vessels in England, but there is in France a law similar to this. See French Pilotage Decree, 29th August, 1854, Art. 8.

173. No ship is allowed to weigh anchor for the purpose of leaving a port or roadstead in which she is anchored without a clearance (*biglietto d'uscita*) from the Maritime authority.

If the captain or skipper intends to leave between sunset and sunrise, he must expressly declare it when asking for his clearance.

This clearance will not be given unless it is shewn that fines for breaches of the provisions of the laws, and dues owing to the Treasury, are paid, and that all the formalities prescribed by the police are complied with. If the departure of the ship is delayed more than five days from the date of the clearance, the latter must be renewed. As regards steamships, a clearance may be granted for a specific period of time.

Cf. Mer. Ship. Act, 1854, §§ 19, 161, 162; Mer. Ship. Act, 1862, § 10.

That is, that a fresh clearance is not necessary for every voyage in the case of all steamers, such as tugs or passenger steamers making short voyages.

174. It is forbidden to throw earth, stones, or any sort of thing into ports, roads, navigable channels and their adjuncts, or into their entrances and approaches from outside, within limits to be determined by the Maritime Authorities in places in which special reasons require such provisions.

If on the banks of navigable channels, or on quays or piers, there are warehouses or workshops for any trade or art, in the exercise of which it is impossible to avoid making a sediment in the water, those who exercise the business must bear the expense necessary to clean out the deposit from time to time, in accordance with the orders of the Maritime Authority.

If, in the course of loading, unloading, or transshipping, and especially in the management of ballast, in spite of the prescribed precautions, any portion of the articles or materials falls overboard and cannot be at once drawn up

by those interested, all expenses of removing the obstruction will be paid, according to the judgment of the Maritime Authority, by the captain of the ship, or by the persons in charge of the lighters set apart for such operation.

Cf. Harbours, Docks, and Piers Clauses Act, 1847, § 73; 54 Geo. III., c. 159; Harbours Transfer Act, 1862, § 16.

175. Condemned ships (*Le navi non più atte alla navigazione*) found in ports, basins, dykes or channels, or other anchorages, cannot be used by their owners as warehouses or receiving hulks, or for any other purpose, but must be broken up when ordered by the Commission mentioned in Art. 194 of this Code.

If the orders of the Commission are not carried out, the Maritime Authority may carry out the breaking up of the ship at the owner's expense.

In Great Britain unserviceable vessels, and wrecks, and other obstructions may be removed by Harbour Masters under §§ 52, 56, and 57 of the Harbours, Docks, and Piers Clauses Act, 1847; but the power to destroy appears to be confined to wrecks, or vessels sunk in the harbour or approaches thereto, or in places where they constitute a peril to navigation, and is given by the Wrecks Removal Act, 1877, and by local Acts.

176. If any ship, or other vessel, remains sunken inside a harbour, or other maritime station, or in a channel leading to such, the owners must take steps to recover that which encumbers the bottom at their expense within the time fixed by the officials of the port, otherwise the ship will be deemed to be abandoned to the State, which will from that time take steps to clear the obstruction.

Cf. Wrecks Removal Act, 1877.

177. The Port officers will watch carefully that no damage is done to the slips, piers, landing-places, and causeways, nor to the floats, buoys, nor to inanimate bodies generally, nor to other works belonging to the State. When any damage happens through the default of captains, skippers, or other persons, the Maritime Authority will ascertain its amount by experts, and take care to have it repaid.

Objection to the order of the Maritime Authority will not suspend the payment, unless the right to repayment be proved before the proper Tribunal.

Cf. Harbours, Docks, and Piers Clauses Act, 1847, § 74. The liability of the owner is absolute under this section, except in case of unavoidable accident, —*Adamson* v. *River Wear Commissioners*, 3 App. Cas., 743, or compulsory pilotage: as to whether the latter would be a defence in Italy, see note to Art. 66, *ante*, and Art. 201, *post*.

178. Merchandise and other articles are not allowed to be left on piers, quays, landing-places, and other places in harbours and docks, except by permission of the Maritime Authority, and on payment of the proper dues.

Notwithstanding such permission and payment, the Port Officer, when the period for which the license was given has run out, and even before, when necessity requires it, can order the removal and shifting of the articles deposited, and if this is not done may proceed to do it officially at the expense of the owner.

Cf. Harbours, Docks, and Piers Clauses Act, 1847, § 68, and Local Acts.

179. Owners of frontages on the banks of channels or rivers which run into a harbour may construct suitable shore-walls (campsedging) to keep up the land. The rules laid down in the Regulations must be observed in the construction of such walls.

Similarly, no opening of a stone quarry or other substantial excavation (in the bank) can be made except by the consent of the Maritime Authority.

180. Fishing in ports, basins, canals, and dykes is prohibited, except with the permission of the Maritime Authority.

The discharge of fire-arms and lighting explosive substances afloat or ashore is especially prohibited, save under a special permit from the Maritime Authority.

Cf. Harbours, Docks, and Piers Clauses Act, 1847, §§ 71, 72, and Local Acts.

CHAPTER III.

Of Police Jurisdiction in Harbours and Roadsteads.

181. The charge of police jurisdiction over ordinary offences in harbours where there is an officer of Public Safety is exercised by him.

In places where there is no such officer, the Port officers will take the necessary precautions in urgent cases and give immediate information to the Judicial authorities.

In large ports there is usually in Great Britain a special Water Police, but under the ordinary jurisdiction, in harbours, &c., special constables can be appointed under § 79 of Harbours, &c., Act, 1847.

182. In case of disturbances on board foreign ships anchored or moored in ports, roadsteads, or channels, the officer of Public Safety or of the Port, on receiving notice, will intervene to prevent further disturbance, giving immediate warning to the Consular Agent of the nation (to which the ship belongs).

If the offence is committed within the body of a county, the ordinary police regulations operate in England. There was much doubt amongst the Judges whether this was so in mere Territorial waters [see *R.* v. *Keyn*, 2 Ex. D. 63], but the doubt is now set at rest by the Territorial Waters Jurisdiction Act, 1878, which regulates the exercise of the Jurisdiction.

183. Captains and skippers of all flags and the owners of small craft are forbidden to shelter or conceal offenders, whether natives or foreigners, or deserters from the military or naval forces, on board their ships.

Cf. Naval Discipline Act, 1866, § 25; Army Discipline and Regulation Act, 1879, § 146, for Seamen of the Royal Navy and Soldiers, and, in cases of felony, by the Common Law, and in some cases of misdemeanour, by Statute, persons harbouring offenders are punishable as accessories after the fact.

See Code of Commerce, *ante*, Art. 113.

184. It is equally forbidden to keep on board ships anchored or moored in ports, roads, cuts, and channels within the Realm, whether the ships be fitted out or dismantled, any persons except the crew, even if they are called watchmen, without the permission of the Maritime Authority.

The same authority can make captains and skippers dismiss watchmen, when such persons have been convicted of the offences pointed out in Articles 28b and 62b, or admonished as rogues and vagabonds, or as suspicious characters within the meaning of the Law of Public Security, and who, on account of their bad characters, have been reported to the authority of Public Security.

There is no similar provision to this in Great Britain; on the other hand the old Acts relating to manning the Navy provided for the shipment of "lewd and disorderly men servants, and rogues and vagabonds, sturdy beggars and vagrants," on board H.M. ships, 2 & 3 Anne, c. 6, § 16.

185. The patrol, composed of agents of the Port officials, has a right to visit, either by day or night, any ship or other craft, sheds, warehouses and other closed places situated on the shores of the port. No one is allowed to refuse to give to the said patrol his Christian name and surname and address, when demanded. The patrol has a right to arrest a person caught committing an offence.

Resistance, outrage, violence, and force used against the agents of the Port officers in the exercise of their duty are treated as done to agents of the Public Force.

The ordinary police would exercise this power in Great Britain; the Harbour Master has also the power to enter to search for fire, &c., under § 72 of the Harbours, Docks, and Piers Clauses Act, 1847; Custom House Officers may search any ship, under § 182 of the Customs Laws Consolidation Act, 1876.

186. Persons belonging to the class of seafaring people, whether natives or foreigners, as well as any person carrying on a trade or profession within the port, may be ordered by the Maritime authority to appear at its office.

A *subpœna*, or a warrant, would require to be served on a person to compel him to come before the magistrates unless he were actually arrested for an offence.

CHAPTER IV.

Of Boats and Other Craft for use of the Port.

187. All boats and wherries intended to carry passengers and goods, hulks, fishing-boats, pleasure boats, and every other craft belonging to ports, roads, channels, and navigable

cuts, are placed under the superintendence of the Maritime authority.

No one can be admitted to carry on the profession of a waterman, to navigate flats, hulks, pleasure boats, or any other species of craft, without a license from the Port office, which is granted on the terms laid down in the Regulations.

Pleasure boats are licensed in England by the Urban Sanitary Authority, except in London, under § 172 of 38 & 39 Vict., c. 55, lighters, &c., are generally regulated by Local Acts, or, as in the Thames, Medway, and Lea, by the Watermen's Acts, and other boats by the Conservancy Acts.

188. In harbours which communicate directly with lagoons, canals, and navigable rivers, the obligation to have the license spoken of in the preceding Article does not apply to gondolas or other small boats specially intended for use in the city, canals, or rivers, which will be furnished with a license from the Corporation.

Nevertheless, such craft, when they come within the place under the jurisdiction of the Port office as prescribed by Art. 163, are under the surveillance of the Port officer, and those who navigate them are bound to observe the Maritime regulations as to order and police.

Any conflict of jurisdiction which may arise between the Port officials and the Town Council as to the regulations for the management of the craft above referred to, will be settled in the first instance by the authority of the Prefect of the place, and in the last resort by Royal decree.

See note to preceding Article.

189. A person who is furnished with a license and number allowing him to navigate a boat within the port, will, if convicted of the offences mentioned in Articles 28b and 62b, be deprived of his license.

The Port official has also the power of temporarily suspending the license of a person convicted of smuggling, or cautioned [*ammonito*] as a suspicious character within the meaning of the Law of Public Security.

190. Anyone wishing to establish a service of steam-tugs for towing ships in ports, roads, creeks, channels, cuts, or straits must be furnished with a proper license from the Maritime Authority, and conform to what is prescribed in the Regulations relative to the matter.

Captains and skippers of steam-tugs are bound, on the mere request of the Port officer, to render assistance in salving and towing vessels which are in danger.

Art. 121 applies in the case of the previous paragraph.

191. The Special Commission which will be annually instructed in the manner prescribed to proceed with the inspection of flats and other craft for loading and unloading, will decide without appeal which are to be broken up as worn out, and which are to be repaired. When the orders of the Commission are not carried out within the time allowed, then, if the orders were to break up the craft, the Port officer will carry it out at the expense of the owner: If to carry out repairs, the owner will incur the penalties laid down in this Code and the Regulations.

CHAPTER. V.

Local Pilots.

192. In every port, strait, channel, and other anchorage-ground in which it is considered convenient, there will be established a body of local pilots for the use of ships.

In each pilotage body there will be one or more head pilots entrusted with the direction of the service.

193. Pilots will be furnished with a license from the Port officer, and will be inserted in a proper register. The conditions on which pilots and head pilots will be admitted, and the rules for the service will be determined by regulations.

194. A pilot convicted of the offences mentioned in Arts. 28b and 62b will be struck off the register, and not restored unless he obtains a new qualification.

196. Pilotage rates will be fixed according to the tariff established by Royal decree.

Cf. Mer. Ship. Act, 1854, § 333; Mer. Ship. Act, 1862, § 69.

197. Any promise of a higher rate than that which the tariff allows, and made at a time when the ship is in danger, will be void.

Cf. Mer. Ship. Act, 1854, § 358; Mer. Ship. Act, 1872, § 9; French Pilotage Decrees, 12th December, 1806, Arts. 40 and 44, and 29th August, 1854, Art. 3.

198. No one outside the Corporation of Pilots can undertake the work of a local pilot.

Nevertheless, fishermen and other seafaring persons, whenever, in the absence of pilots, they are requested to lend their assistance to take a vessel into port, or through a difficult passage, may accept the charge, if directly on coming on board they declare that they are not authorised pilots.

Cf. Mer. Ship. Act, 1854, §§ 361, 362, and French Pilotage Decree, 29th August. 1854, Arts. 10, 11.

198. The Corporation of Pilots must give bail for the amount determined by the regulations.

There is a similar provision to this and the following Article in many Foreign States, *e.g.*, Russia, Com. Code, 1218; Portugal, Com. Code, 1583. In Great Britain the remedy is against the Pilot alone, and is limited, in the case of Trinity House Pilots, to the amount of his bond, *i.e.*, £100, by Mer. Ship. Act, 1854, §§ 372, 373.

199. The Corporation of Pilots will be responsible up to the amount of the bail for damages caused by the want of skill or negligence of a pilot, the right to further relief against the latter being reserved.

See Note to preceding Art.

200. The employment of a pilot may be declared compulsory by the Government in harbours, roadsteads, and channels in which it is considered necessary.

See Note to Art. 201.

201. A pilot who is in charge of a ship has the right to fix the course, and to order any manœuvre of sails, anchors,

ropes, moorings, and whatever else relates to the safety of the vessel.

As already pointed out in the Note to Arts. 66 (2) and 107, *ante*, the local pilot is subordinate to the captain and officers; but, in consideration of these two articles, it may be argued that when he is employed compulsorily, under Art. 200, his position is defined by Art. 201, and that, in that case, and that case only, he supersedes the captain in the direction of the ship, though still remaining subordinate to him and other officers in matters of discipline; in fact, that he is *pro hac vice*, and for the particular purpose of directing the ship, a person authorised in the terms of this Code (see Art. 37, *ante*) to command a merchant ship, but there appears to have been no decision as to status of a Compulsory Pilot in Italy. If this is the true view, the Italian law of Compulsory Pilotage, and the exemption to the owners of a ship accruing from the employment of a Compulsory Pilot, would appear to be similar to the law of England and Germany (German Com. Code, 740), and not, as deduced from Arts. 66 and 107, to that of France and other places mentioned in the Note to Art. 66.

202. Pilots may not leave ships committed to their direction before they are anchored and placed in safety in the place of their destination, and, when the ships are outward bound, until they are outside all dangers.

Cf. Mer. Ship. Act, 1854, § 365 (10, 11), French Pilotage Decree, 12th December, 1806, Art. 35.

203. Captains and skippers who wish to keep pilots on board after they have passed beyond the dangers, and as long as they remain in sight of the anchorage, must give them the daily pay due for the service, as laid down in the tariff referred to in Art. 195.

Cf. Mer. Ship. Act, 1854, § 357, and for France, local regulations, *e.g.*, for the Seine, Art. 224.

204. The special service in each port, and the pilotage of tug-boats, will be settled in each separate locality by special regulations.

CHAPTER VI.

General Provisions.

205. The charges to which Arts. 159, 170, 174, 175, 176, 177, 178, and 191 refer, will be repaid on the note of the

Maritime Authority, and are rendered executory as in the last paragraph of Art. 56.*

206. In case of stranding, shipwreck, fire, or other extraordinary circumstance urgently requiring the assistance of the Authorities, the Port office may requisition the labour of seamen, boatmen, labourers, porters, and any other workmen, and such persons may not refuse, under the penalties prescribed by this Code.

* Similar power in case of stranding or distress is given to the Receiver of Wreck in Great Britain by §§ 441, 442, of the Mer. Ship. Act, 1854.

F. W. RAIKES.

IV.—THE MAR PEERAGE AND ESTATES.

ALL civilised systems of law have maxims that it is desirable, in the interests of all parties, that there should be an end of every litigation; and that, after the lapse of various periods of time rights, imperfect, invalid, and illegal at first, become perfect, valid, and legal. But still, although the rights thus acquired cannot be overthrown by the regular tribunals, historians and lawyers have alike impugned and rejected the conclusions of the regularly constituted tribunals, and have shewn that the latter have, in some instances, fallen into grave and serious errors in the matters submitted to them for their decision. The aim of the present Article is to prove (1) that the Report of the Committee for Privileges of the House of Lords as to the Mar Peerage in 1875 was founded on gross and serious errors; (2) that these errors have not been wholly removed by an Act of Parliament passed in 1885; and (3) that the decision in the Court of Session as to the Mar estates in 1873, and affirmed in the House of Lords in 1876, was conformable to the law of Scotland. In undertaking to demonstrate these three

propositions, I am perfectly well aware that I undertake a grave and serious responsibility; but, animated by the love of truth and appealing to an impartial circle of readers, I have no fear of the result. The errors committed and the injustice done may be irreparable; but they are not beyond the scope of honest and impartial inquiry. Already the errors of 1875 have been partially remedied by the intervention of the British Parliament. If they have not been wholly removed, they ought to be so in some way or another. I proceed to the demonstration of the three propositions which I have undertaken to prove, and wish and intend to consider the great Legal and Constitutional questions involved on the sure basis of Law and Justice.

The Mar dignity is the most ancient Earldom of Scotland, and is the only surviving Celtic Mormaorship of that country, and is one of the brightest ornaments of the British Crown. Its origin takes us back almost to the pre-historic times of Scotland.[a] The *Annals of Ulster*, as shewn in the Minutes of Evidence in the claim to the Mar Peerage by the late Earl of Kellie, at pages 659 and 702, prove that an Earldom of Mar existed as early as 1014. They state that Donald, Mormaer of Mar, went to Ireland with a contingent from Albin, or Scotland, to the assistance of Brian Boruimhe, the heroic Ard Righ, or King of all Ireland, and fell with him in the hour of victory at the great battle of Clontarf waged against the Danes. Mormaer is the Celtic word for *Comes*, *Iarl*, or Earl. In purely Celtic times in Scotland, as well as in Ireland, or, in other words, before King David became Prince of Cumbria or Strathclyde and King of Scotland, the proprietorship of every great territorial division of Scotland and the supremacy or chiefship over the people thereof belonged to the tribe dwelling therein. In those days, the chief was chosen from amongst the male descendants of the founder of the tribe. He was not always the nearest, but the most powerful of the blood of

the ruling family. The Celtic Mar dynasty became extinct at the close of the 14th century.

Riddell, in his work on *Scottish Peerage and Consistorial Law*, proves that the Earl of Mar should have been ranked as the first or premier Earl of Scotland. Right to the Mar peerage was fully proved in 1606, as of the year 1404, by Charters produced before the Royal Commissioners appointed by King James VI. From the evidence of the Mar Charters, it is clear that this ancient family was connected with the counties of Aberdeen and Banff as early as the 12th century. In 1404, Kildrummie was the chief castle and messuage of the Earl of Mar.

On the introduction of Feudalism into Scotland by David I., and for long after, like every kind of hereditary office and dignity in Scotland, all rights in land were supposed to be received from the Sovereign, and heirs male were generally preferred in the succession to land. But the Celtic Earldoms of Scotland, originally descendible to male agnates only, became descendible to heirs general. This proposition is clearly proved by Lord Hailes in the Sutherland Peerage claim.

The assumption that Scottish Feudalism preferred the heirs male to the heirs of line or heirs general is without any foundation in law or history. Donald II., who was Earl of Mar in 1290, had a son, Gartney, or Gratney II., who became Earl of Mar, and also a daughter, Isabel, wife of King Robert the Bruce. Gratney II. married Christian Bruce, sister of King Robert, and received from King Robert the Lordship and Earldom of Garioch, to be held in free regality, and apparently as his wife's portion. Hence the Mar family was related by a double tie to the Royal family of Scotland. Gratney II. left three children, namely, Donald III., Earl of Mar, afterwards Regent of Scotland, and two daughters, of whom the elder, Elyne, or Ellen, was the ancestress of Sir Robert Erskine, who succeeded to the

Earldom of Mar in 1438. Sir Robert Erskine was the ancestor of John, Lord Erskine, who was restored by Queen Mary to the Earldom of Mar in 1565. The younger daughter was married to the ancestor of the Lords Lyle. Gratney II., Earl of Mar, and John, Lord Erskine, were ancestors alike of John Francis Erskine Goodeve Erskine, Earl of Mar, and of Walter Coningsby Erskine, Earl of Kellie, in the recent *cause célèbre* in Peerage Law, begun in 1867.

Descendible to females, the Earldom of Mar was possessed by Lady Margaret De Mar, Countess of Douglas and Mar, and thereafter by Lady Isabel Douglas, as Countess of Mar and as daughter of Lady Margaret. Lady Isabel was surrounded by a network of intrigue at the instigation of her mother, Countess Margaret, who, at the expense of the Mar family, wished to benefit George Douglas, her own illegitimate son. She was subsequently forced into a marriage with Alexander Stewart, the illegitimate son of Alexander, Earl of Buchan. The latter was popularly known as the Wolf of Badenoch, and was a son of King Robert II., by his first wife, Elizabeth Mure. This Alexander Stewart seized on Lady Isabel in the summer of 1404 at her Castle of Kildrummie, and subsequently to the assassination of Sir Malcolm Drummond, her first husband. Mr. Tytler, the Scottish historian, asserts that "there seems to have been little doubt that the successful wooer and the assassin of Drummond was one and the same person."

Under a covenant of future marriage, Lady Isabel, by a charter, dated the 12th August, 1404, bestowed *inter alia* the Earldoms of Mar and Garioch upon Alexander Stewart in free gift, with remainder to the heirs to be begotten between them, whom failing, to his own heirs and assigns whomsoever. This charter was never ratified by the King; and, therefore, by Feudal law, was null and void. But it is known to have been in existence by its being recorded on the Register of the Great Seal of Scotland, by the special command of King

James III., in the year 1476. Moreover, this charter was renounced by Alexander Stewart on the 9th September, 1404. Subsequently, on the 9th December, 1404, Isabella de Douglas, *Comitissa de Mar et Garrioch*, executed a new charter in view of her marriage with Alexander Stewart, but reserved the life-rent enjoyment of the Earldoms of Mar and Garioch to the longer liver of them, and with an ultimate destination to her own heirs *ex utrâque parte*, namely, to Janet Keith and the Erskines on the side of her mother, and to the Douglas heirs on the side of her father, in the event of there being no issue of the marriage. This second charter was followed by infeftment or seisin, and was confirmed by King Robert III. on the 21st January, 1404-5. These two charters are the foundations upon which have been reared the rival contentions of nearly 500 years. The first charter lay at the basis of all the injustice which was perpetrated as to the estates and dignity of Mar from 1435 to 1565; but that charter, and everything which followed upon it, was formally condemned by a final judgment of the Court of Session in 1626 as null and void. By the same judgment, the second charter, and all that followed thereon, was held to be good and valid. This latter charter was also the basis of the right of Sir Robert Erskine, as Earl of Mar, to the fief and dignity under a Retour of Service passed in his favour in the year 1438. Sir Robert Erskine was the son of Janet Keith, the eldest heir-general, and the descendant and representative of Elyne of Mar, who was the wife of Sir John Menteith, Lord of Arran.

Notwithstanding the nullity of the charter of the 12th August, 1404, Alexander Stewart resigned the Earldom of Mar into the hands of King James I. after his return from captivity in England, and received it back by Royal charter on the 28th May, 1426, to himself for life, and to his natural son, Sir Thomas Stewart, in fee, with a destination to the heir male of the body of Sir Thomas, and with an ultimate

remainder to the Crown. Alexander Stewart having died without issue in the year 1435, the King then seized on the Earldoms of Mar and Garioch. The resignation by Alexander Stewart and the charter by James I. were both illegal, and were condemned by the Court of Session in 1626 as invalid and illegal, and the King's right stigmatized as "ane simple and naked poesessioun, without all richt of property." But, in spite of right and justice, and by the strong hand of wrong and oppression, all the Sovereigns of Scotland, from King James I., in 1435, to Queen Mary in 1565, treated the Earldoms of Mar and Garioch as absolutely belonging to the Crown, and to be used or disposed of as they thought proper. Thus, the Erskines were deprived of the fief and Earldom of Mar for 130 years; and, during that long period, the Scottish sovereigns dealt with the fief and dignity as their own, and bestowed them as to them seemed best.

The cruelty and oppression exercised against the Erskines do not stand alone in the history of Scotland. They were not inflicted for their own sake, but as a part of a National policy. With the exception of King James IV., all the Sovereigns of Scotland, from James I. down to Queen Mary, relentlessly broke up, destroyed, and annexed to the Crown all the great Feudal, or Feudalised Earldoms of Scotland, and especially those possessed of Palatine authority, or rights of Royalty, conferred or sanctioned by the Crown. A similar policy had been carried out by the Kings of England, and had resulted in the total destruction of the ancient noble families in England. The results in Scotland were not so disastrous as in England. But the sovereign rights possessed by the ancient aristocracy in both countries were gradually curtailed and ultimately abolished. The haughtiness and arrogance of the Feudal lords and nobles were more tempered and restrained by the old Clan or Tribal rela-

tions in Scotland than they were in England. This contest was one for supremacy, and ended in England, and in Scotland, and also in France, in favour of the Sovereign and against the great nobles; but neither in England nor in Scotland was the conflict so terrible as in France, where the Revolution of 1789 was mainly caused by the wrong and oppression of the French nobility for several centuries.

In Scotland, the great Earldoms, endowed with semi-Royal powers, and with almost independent and Sovereign rights in their own territories—*e.g.*, in Strathearn, March, Lennox, and Mar—were all crushed down or absorbed by King James I. The Earl of Douglas was destroyed by King James II. at the end of the 15th century; the Earl of Ross, Lord of the Isles,, at the beginning of the 16th century; and the Earl of Angus, and the Red Douglases and Crawford, by King James V., in the middle of the 16th century. The Scotch nobles were devoted to King James IV., and they sacrificed their lives with him in large numbers on the fatal battle-field of Flodden. But the general policy, from James I. to James V., to reduce the powers of the great Feudal aristocracy of Scotland was carried out by gross injustice, wrong, and oppression. This policy aimed at the merging of the great and powerful Earldoms in the Crown, and was adopted by King James I., and brought about his own death at the hands of a hated and formidable aristocracy. This policy was practically successful in the 16th and 17th centuries throughout the whole of Europe, and not less so in Scotland than in England and on the Continent. The great powers of the old Feudal lords lingered in Scotland till the rebellions of 1715 and 1745, and have ended in the Parliamentary supremacy of the Nation at large and the subordination of the Territorial aristocracy. But the policy was abandoned by Queen Mary, and atonement

made, as far as could be, in several important instances, of which the Earldom of Mar is an illustrious example.

Although, during the period between 1435 and 1565, the Scottish Kings dealt with the Earldoms of Mar and Garioch as their own, and clothed their claims with Statutory and Charter authority, and although the Erskines generously spent their treasures and poured out their blood for their Sovereigns, still the Erskines did not abandon their birthright, but continued to hope that the day of Justice and restoration in their case would arrive. On the death of Alexander Stewart, Earl of Mar, Sir Robert Erskine, otherwise styled Robert, Lord Erskine, the son of Thomas Erskine and Janet Keith, the eldest Mar co-heir under the Charter of the 9th December, 1404, and confirmed by the Royal Charter of the 21st January, 1404-5, entered upon the stage as a chief actor in the Mar drama, and took steps to vindicate his inheritance. King James I. having been assassinated in 1437, Sir Robert Erskine of that ilk, the first Lord Erskine, took out service in his favour in 1438 as nearest legitimate heir to his cousin, Isabel, Countess of Mar and Garioch, in half of the lands and lordships of Mar and Garioch, as appears by a Special Retour of Service obtained by him on the 22nd April, 1438, and by another Special Retour of Service obtained by him on the 16th October, 1438. Both of these Retours were produced in the Court of Session in 1626. As they evidently apply to one and the same half of the Lands and Lordships of Mar and Garioch, and differ as to the appraised annual value of the lands of Mar, and omit all reference to Garioch, I do not well understand why there should have been two Retours of Service obtained by Sir Robert in the County of Aberdeen. Protests and claims were made by the Erskines, and repudiations and counter-claims were made by the Scottish Kings in the Privy Council and Parlia-

ment of Scotland at various times from 1435 to 1565 as to the lands and Earldoms of Mar and Garioch. These protests and claims were always for the whole, not the half, of the lands of Mar and Garioch. Whatever may be the proper explanation of this matter, the Retours are both evidence of certain legal rights of Robert, Lord Erskine, in and over the lands of Mar and Garioch, and prove him to be the heir of Isabel, Countess of Mar and Garioch. Perhaps the real explanation is that the Lyles were entitled, or claimed to be entitled, to a half of the lands of Mar and Garioch. But this explanation would not affect the right of Robert, Lord Erskine, and his descendants to the other dignities, which were descendible upon the eldest or elder daughter of a Scottish Earl, and did not fall into abeyance as they would under English Peerage Law in the case of a co-heiress in an English noble fief.

Robert, Lord Erskine, invariably styled himself Earl of Mar, or Earl of Mar and Garioch; but the Crown acknowledged neither him nor any of his descendants till 1565 under this designation. Bare titles of nobility were not so much esteemed in the 15th and 16th centuries as they are in the present age. In Scotland the *jus sanguinis* was practically valueless without a territorial fief till modern times, and was hardly appreciated as a right of inheritance till the close of the 15th century. For my present purpose, I may therefore pass over the dealings with the lands and Earldoms of Mar and Garioch by the Scotch Kings. But before treating of Queen Mary's restoration to John, Lord Erskine, in 1565, I must refer to the proceedings taken by King James II., in the year 1457, as to the Mar estates and dignities.

At a Justiciary Court, held at Aberdeen, on the 15th May, in that year, in the presence of the King himself, who appeared as prosecutor in his own cause, and with the Chancellor of Scotland as his advocate, the demands of Thomas, Lord

Erskine, for a Retour of Service to his father, Robert, Lord Erskine, in the Earldom of Mar, by virtue of the services of 1438, was refused, and the Retour of 1438 was reduced and set aside, on the ground that the Earldom belonged to the Crown as *ultimus haeres* of Alexander Stewart, Earl of Mar, under the Charter of the 12th August, 1404, and not to Lord Robert as (co-) heir of Isabel, Countess of Mar. In the application by Thomas, Lord Erskine, for a Retour of Service to his father in the Earldom of Mar, the Chancellor delivered an address to the jury impanelled to decide on the case, to the effect that the Earldom was lawfully vested and seised in the person of King James I., and belonged to King James II. when he received the crown and sceptre of Scotland. Whereupon the jury found, by their verdict, that the late Robert, Lord Erskine, the father of Thomas, Lord Erskine, did not die seised and vested as of fee in half of the lands of the Earldom of Mar; but that the said lands were, and had been lawfully in the hands of the King through his death and from the time of the death of his late father King James I. This verdict was what is called a negative service, inasmuch as it rejected the right of succession put forward by the claimant.

The Royal power was victorious over justice; and the Erskines preserved a dignified silence in the presence of injustice. Justice, however, was at last done by Queen Mary's Charter of 1565, and by a decision of the Court of Session, as the Supreme Civil Court of Scotland, judicially affirming, in 1626, that these proceedings of the Justiciary Court at Aberdeen, in 1457, were null and void, and that the Retours of 1438 were good and valid. The public conscience of the country had awoke at last to the conviction that a great wrong had been inflicted on the house of Mar, and Mary Queen of Scots, always anxious to redress injustice, intervened, and with the applause and concurrence of the two factions which

distracted Scotland in the memorable year 1565, restored the *Comitatus* of Mar to John, Lord Erskine, by Charter dated the 23rd June, 1565. Thereafter, in 1567, the Parliament of King James VI. of Scotland ratified this Charter; and in 1587, by its supreme legislative authority, it further aided the family of Mar in recovering as much as possible of the portions of the fief which had been alienated by the Crown. This restoration was highly and fully approved by the Roman Catholic party attached to Queen Mary, as well as by the Protestant party devoted to the Lords of the Congregation and the Reformed Religion.

The first step in the restitution was a Brieve of Inquest, issued out of the Royal Chapel or Chancery, addressed to the Sheriffs of Aberdeen, Stirling, and Clackmannan, assembled in the Town Hall of Edinburgh. The Court was held under the presidency of these Sheriffs on the 5th of May, 1565, and fifteen noblemen and landed gentlemen of those three counties gave a verdict in favour of John, sixth Lord Erskine, as the legitimate and nearest heir of Robert, Earl of Mar and Garioch and first Lord Erskine, grandfather of Alexander, third Lord Erskine, who was great-grandfather of the said John, sixth Lord Erskine. This verdict legally established that John, sixth Lord Erskine, was the descendant and representative of Robert, Earl of Mar and Garioch, and thereby connected the last lawful tenant of the fiefs and dignities of Mar and Garioch with John the first Lord Erskine, in the regular chain of feudal succession. The second step was a Charter by Queen Mary, executed by her under the Great Seal of Scotland, and dated the 23rd June, 1565. This deed, by way of restitution to the said John, Lord Erskine, his heirs and assignees, granted the entire Earldom of Mar and lordship of Garioch, as possessed in ancient times by the Countess Isabel, and proceeded on the narrative that the estates of Mar and lordship and regality of Garioch had been unjustly withheld from his

ancestors. As the barony and castle of Kildrummie had been conveyed by the Crown to the Elphinstones, the Manor of Migvie was declared by the Charter to be a sufficient place for infeftment or seisin to be taken in the entire Earldom of Mar, and the Castle of Dunnydeer for the lordship and regality of Garioch, and the whole were declared to be held *Johanni, domino Erskine, suis haeredibus et assignatis in libero comitatu, feodo, et haereditate in perpetuum*. By this Charter, the whole then existing rights of the Crown as to the Earldom of Mar and Garioch were transferred to John, Lord Erskine, who proceeded as speedily as possible to get himself infeft in his ancestral titles and lands. The next steps were the taking of seisin in terms of the Queen's Charter at the places specified for infeftment. These steps were undoubtedly taken, but complete evidence of them does not now exist. The instrument of seisin for Mar cannot now be found, but that for Garioch exists, and is dated the 24th July, 1565. Till seisin was taken, and the instruments returned to Edinburgh, and there verified by the proper officers of the Crown, Lord Erskine could not be known to be fully and legally in possession of the fief and dignity under the Charter. These facts amply explain the reason why John, sixth Lord Erskine, continued to be called Lord Erskine on the Minutes of the Privy Council down to the 24th July, 1565, and did not appear under his higher title of Earl of Mar till the 1st August of that year.

This Royal Charter by Queen Mary granted the dignity as well as the lands of Mar and Garioch to John, Lord Erskine, and no other Royal Charter, or Patent, or other document was necessary at that time to confer the dignity. By it the restitution of the Dignity took effect at once, or at least as soon as all the feudal formalities were completed by seisin; but the restitution of the fief was not complete till 70 years after this Charter, and not till long and tedious litigations were at an end in 1626. Royal Letters Patent,

or Charters conferring a personal and inheritable dignity, apart from lands, or some Royal Office, were utterly unknown in Scotland till after Queen Mary's son, King James VI. of Scotland and I. of England, removed to England on the death of Queen Elizabeth. The order of succession and right of assignment even to strangers laid down in Queen Mary's Charter were practically the same as existed in the time of Countess Isabel, and included heirs female as well as male, and covered a different set of persons than the blood relations of the grantee, but under such conditions and restrictions as applied to territorial fiefs and dignities originating from the Crown.

An Earldom of Mar and Garioch, and only one, was restored by the Charter of Queen Mary. To what series of heirs was this Earldom restored ? To the heirs male or to the heirs general? On the hypothesis of a new creation, and the extinction of the Ancient Earldom, the Committee for Privileges of the House of Lords reported in favour of the heirs male. But, on proof of the existence of the ancient Earldom of Mar, the British Parliament in 1885 decided in favour of the heirs general. As I shall afterwards point out, the true Earl of Mar, whoever he may be, necessarily and inevitably destroys another and second Earl of Mar on the Union Roll.

That the lands of the Earldom of Mar and Garioch were alone included in and comprehended under this Charter, and not the dignity as well; and that the dignity of Mar was descendible to heirs male, and not to or through heirs female, were, and are, assumptions for which there are no good or valid reasons in the history of laws of Scotland. If these assumptions had not been dissipated by an Act passed in the British Parliament in the year 1885, I should have considered myself bound to prove them to be erronerds but to engage in any such proof now would be a purmilies. of time. Another assumption must also be abanverdict,

untenable, namely, that the ancient Earldom of Mar was extinct about or in the latter part of the 14th century, and in or about either the year 1404 or 1435. If, then, the ancient Earldom of Mar was restored to the Erskines by Queen Mary's Charter of 1565, and if a new Earldom of Mar was not created by her in that year, there is no room for the Earldom of Mar referred to in the Resolution of the Committee for Privileges of the House of Lords in the year 1875.

The final step in the restitution of the Mar estates consisted in the legal proceedings instituted by John, Earl of Mar, and carried to a successful issue by his son and successor against Lord Elphinstone and others, who had obtained grants of portions of the Earldom of Mar from the Crown, and who had become direct tenants of the Crown in consequence of the alleged succession or forfeiture of the Earldom of Mar to the Crown in the reign of James I. of Scotland. John, Lord Erskine, who was restored to the Earldom of Mar in 1565, died Regent of Scotland. John, Earl of Mar, his son and heir, was brought up with King James VI. under the care of the Countess of Mar, the Regent's widow, and of Sir Alexander Erskine of Gogar, the Regent's younger brother. This John, Earl of Mar, was the trusted friend of King James VI., and held the office of Lord Treasurer of Scotland from 1615 to 1630. He was served heir to his father on the 3rd March, 1572-3, in the *Comitatus* of Mar. But on the 13th July, 1577, Robert, Lord Elphinstone, the grandson of Alexander, first Lord Elphinstone, had seisin as his father's heir in the Town and Burgh of the Barony of Kildrummie. Robert, Lord Elphinstone, died in 1602, and John, Earl of Mar, the Treasurer, sued this seis... Robert's son, who was Treasurer of Scotland, 70 year... 601, for recovery of Kildrummie in 1624—26. Nearly litigations ...s previously, in 1587, an Act of the Scotch Parlia-

ment was passed in favour of John, Earl of Mar, protecting his rights in the Earldom of Mar, and on proper legal warrant against prescription. This Act was passed thirty years before the Scotch Act of Prescription became law, in 1617, and at a time when neither the right of blood, nor any heritable right was taken away or destroyed by any length of time. It declares that Earl John's rights shall be the same as if he had been the immediate heir of Isabel Douglas, Countess of Mar; and that it was passed without prejudice to all lawful defences competent to the parties having interests. This exemption compelled the restored Earl John to raise actions of Reduction of the rights acquired under grants from the Crown, and followed by seisin in due course and form of law.

The Act of 1587 was fiercely assailed by the Elphinstones in 1624—26; but it was upheld by the Court of Session in 1626 on all the points raised by them. In passing, I may here state that Lord Elphinstone, and the Earl of Huntly, and others protested in Parliament against this Act of 1587. On the 20th March, 1588-9, Earl John obtained a General Service in his favour as lawful and nearest heir of Isabel, Countess of Mar, "the grand-daughter of Donald, Earl of Mar, the brother of Lady Helen de Mar, who was the great grandmother of Robert, Earl of Mar, the grandfather of Alexander, Lord Erskine, great grandfather of John, late Earl of Mar, the father of Earl John," who is designated in the Report of the Brief of Inquest as "now Earl of Mar, Lord Erskine of Alloa." Of the same date as this General Service, which established the right of blood and representation by progress from the common ancestor of the Countess Isabel and Earl John, Earl John was served heir to Isabel in the lands of Strathdee and Braemar by the verdict of the same Jurors, who were lesser barons or lairds and representatives of ancient and distinguished families. Upon the special service, following on this latter verdict,

he was infeft on a precept of service issued from Chancery on the 7th November, 1589. These legal preliminaries completed, Earl John was ready to begin legal proceedings for the recovery of all the alienated lands and dependencies of the great and noble fiefs of Mar and Garioch.

Legal proceedings were accordingly commenced in the Court of Session in 1593 against William Forbes of Corse, and were then discontinued for several years, and were not finally decided till 1621 when final judgment was passed against the Defender's son, after the original Defender's death, in favour of Earl John. On the 21st June, 1621, the various documents relied on by the parties, and amongst others, the Renunciation of Alexander Stewart, Earl of Mar, dated the 9th September, 1404, were produced, examined, and decided upon; and on the 23rd of the same month and year, final Judgment was delivered by the Court against Forbes, then of Corse, in favour of Earl John, rescinding, decerning, and declaring as sought for by his lordship.

Subsequently, in 1620 or 1621, legal proceedings were also commenced in the Supreme Court of Scotland against Lord Elphinstone and his son Alexander, the Master of Elphinstone, and the Master's wife, for the recovery of Kildrummie, which had legally remained in the Elphinstone family, under a grant of King James IV. to them, who had greatly increased its value by the purchase of adjacent lands and the patronage of kirks, during their occupation for about a century from 1510. The summons in this action called, *inter alia*, for the production of all infeftments, Charters, or instruments of whatever kind granted to the Defender, Lord Elphinstone, or his ancestors, or any other to whom they succeeded *jure sanguinis*, by King James VI. or his ancestors, Kings of Scotland, since the Charter of confirmation and infeftment of the 21st January, 1404-5, in favour of Countess Isabel of Mar, and prayed that those Charters and instruments thus called for should be reduced

and cassed as null and void as regards the right to Kildrummie and its dependencies, and asked for a declaration of the right in the same as existing in Earl John and his son as heirs of the Countess Isabel. On the one side, all the writs or evidents, twenty-three in number, relied on by Earl John were duly lodged with the Court of Session. On the other side, Lord Elphinstone produced the Charters of the 12th August, 1404, and the 18th May, 1426, from the Great Seal Register of Scotland, the Acts of Parliament of King James II. regarding the Crown lands, and an extract, or office copy, of the Testimonial and Retour Negative of 1457, the original Charter of Kildrummie to his ancestor in 1507, and the progress of writs, based on that Charter to his own time. Further, by way of counter-blast by the Elphinstone family, an action was raised at the instance of the King, the Earl of Mar, and others as prosecutors, against Andrew Wood, the elder of Largo, as the sole survivor of those who sat on the Brieves of Inquest of 1588-9. In this action the summons called upon the Court to inflict the punishment due to those who were convicted of the crime of "*temere jurantium super assisam*," and the Director of Chancery and the Clerks to the services of 1588-9 were called, along with the laird of Largo, to produce the "pretendit" services to be reduced and annulled. But this action was not followed up, and consequently fell to the ground, and the general and special services of 1588-9 in favour of John, Earl of Mar, the Treasurer, stand unimpeached to this day.

Although twenty-seven years had elapsed between 1593 and 1620, we ought not to be surprised at the delay. Much sympathy was felt in Scotland for the Defenders in the actions at the instance of John, Earl of Mar; but justice had to be done by the Courts, and the injustice of 130 years had to be redressed. The fight then, as lately in the late Mar Peerage contest, was over the Charters of August and December, 1404. The truth is that down to the

16th century, the assertion of the rights restored to the family of Mar, if attempted to be enforced, would have involved the whole of the parties concerned in what would practically have been Civil war. By the personal influence of King James VI. a new and mild policy and civilisation in Scotland were taking the place of the Feudal policy and manners; and claims and disputes which would formerly have been settled by the sword and the dagger were now peacefully decided in the Courts of Justice. Between 1593 and 1620, in a single generation, the change which had passed over the spirit of the people and nobles of Scotland was incalculable, and was far more than had happened in the same period in England, where the Feudal system was almost extirpated under the Tudors.

In this great Mar and Elphinstone law-suit, point after point, bearing on the merits, was decided by solemn Interlocutors, until the final Judgment on the whole case was given on the 1st July, 1626. During these legal proceedings, fears had been excited in the minds of several powerful noblemen lest the Earl of Mar, as the representative of Isabel, Countess of Mar, should, under his general service to her, raise claims to the Douglas estates. These fears induced King James VI. and Charles I. to write to the Lords of Session not to proceed till the Earl of Mar renounced such claims. Accordingly his lordship renounced them, and his renunciation was recorded in the books of the Court of Session. Then the Court, by its final decree, held that the whole of the "pretendit" infeftments, charters, and precepts granted to the Elphinstones, and produced in the action, ought and should be "reducit, retreitit, rescindit, cassit, annullit, decernit, and declarit to have been from the beginning, and to be now, and in all time coming, null, and of nane availl, force nor effect, with all that has followit, or may follow thereupon."

This final decree, pronounced by a just, impartial, and qualified Tribunal, and with all the interested parties before it, and represented by the ablest Scotch counsel, at a time when the Scottish Bar was rich in able jurisconsults, stands unchallenged to the present day; and, being pronounced *in foro contentioso* by a Court of Supreme Jurisdiction, is unchallengeable in any Court of Law in this Kingdom. At the time when it was delivered, and down to the time of the Union between England and Scotland, no appeal could be taken from it to the Parliament of Scotland, or to any other Court whatsoever.

Till nearly the end of the 17th century, the Court of Session was the Supreme Tribunal in all Civil causes, including claims to dignities, and, till the Union, absolutely in dignities, and no appeal lay from it, from the time of its institution by King James V., in 1532, till the Revolution of 1688, and, practically, till after the Union between England and Scotland in 1707. To this Court Kings, Princes, Nobles, and Common People resorted for the defence and protection of their Civil rights in the final resort. I ought to state, however, that by the Claim of Right, passed by the Convention of the Scotch Estates in 1689, it was declared to be lawful to protest for remedy of law to the Scotch Parliament, which then and always sat in one House. After the Union in 1707, the English and Scotch Parliaments ceased to exist, and the British Parliament took their place. In 1709, the British House of Lords assumed the right to suspend the Decrees of the Court of Session, and, ever since this right has never been challenged, and, in nearly every case, has been highly advantageous to the Scottish people. But at, and long before, the Union, all the Decrees of the Court of Session were unalterable and irreversible by any Court of Law in Scotland. Since the Union, the Court of Session has the same jurisdiction and

authority and privileges as before it, unless in so far as the same have been taken away by the British Parliament for the better administration of justice.

All the rights of the parties arising out of this final decree in favour of the Earl of Mar were amicably referred by the parties interested to the decision of friendly Arbiters, who fixed the sum of 48,000 marks as the sum to be paid by John, Earl of Mar, to the Elphinstones. Thus, this great litigation was settled in a way which was honourable to all the parties concerned. Legal proceedings were thereafter instituted against a host of vassals on the Mar estates, and were all finally decided on the 26th March, 1635, in favour of the son and successor of Earl John, who, at the end of the Feudal age in Scotland, had died about three months before that date. Surely one might imagine that John, Earl of Mar, was well nigh tired to death of his litigations for the recovery of his ancestral estates? Be this as it may, Earl John, the Treasurer, was a pupil of Buchanan, the Historian of Scotland, and was a ripe scholar, a gallant soldier, an able statesman, and an honourable man. Proud may be that country which has men of this stamp as its citizens and rulers.

The fortunes of the Mar family culminated in the person of this Earl John, the Treasurer, and thereafter began to decline. The Erskines were faithful to the Royal cause throughout the Rebellion of 1640, and were punished by fines and sequestrations down to the date of the Restoration. Their debts contracted in the causes of King Charles I. and King Charles II. necessitated the sale of one after another of the family estates, including the barony of Erskine, their original honour, on the Clyde, till their possessions were reduced to little more than the lordship of Alloa, which, although it was an ancient dependency of the Erskine family, had the supreme right of regality annexed to it.

These losses reached their highest point in the time of Earl John, who was the great grandson of the Earl-Regent, who was restored in 1565. This Earl of Mar was the leader and head of the Scotch rebellion of 1715. He was convicted of high treason, deprived of his honours, and forfeited his estates to the Crown. In 1739, those estates were purchased by some members of the Erskine family, and were re-settled in the manner which I shall hereafter fully explain. The attainder of the honours was reversed in 1824, and the titles were restored to the lineal heirs of the Erskine family in the person of John Francis Erskine, Esquire, of Mar, the grandson and lineal representative of the said John, Earl of Mar.

John, Earl of Mar, the attainted Earl, left an only son, Thomas, usually styled Lord Erskine even after his father's attainder, and an only daughter, styled Lady Frances Erskine. Thomas, Lord Erskine, died in 1766 without issue, and Lady Frances then became heir of line, or heir general, of the Earls of Mar. She married her cousin, James Erskine, son of James Erskine, Lord Grange, a Judge of the Court of Session, a younger son of the forfeited Earl, and who, after the death, without issue, of an elder brother, in 1774, was the heir male of the Mar family. Lady Frances and her husband had one child, a son, John Francis Erskine, who was thus both heir male of the Erskines and heir of line of the Mar, and in his person the Earldom of Mar was restored in 1824. This John Francis, Earl of Mar, had two sons, John Thomas Erskine, Earl of Mar, who died in 1828, and Henry David Erskine, who died in 1848. John Thomas Erskine, Earl of Mar, had one son, John Francis Miller Erskine, Earl of Mar, who became also Earl of Kellie, on proving that the male issue of the first Earl of Kellie was extinct; and two daughters—(1) Lady Frances Jemima Erskine, who was married in 1830 to William James Goodeve, Esq., and who died in 1842, leaving,

with four daughters, a son, John Francis Erskine Goodeve Erskine, eventually heir of line to the Earls of Mar; and (2) Lady Jane Janetta, married to Edward William Chetwode, Esq., and who died in 1862, leaving issue. John Francis Miller Erskine, Earl of Mar and Kellie, died without issue in 1866. On his death the Earldom of Kellie fell to Walter Coningsby Erskine, as twelfth Earl of Kellie, who was the son of the said Henry David Erskine, and the grandson of the Earl of Mar restored in 1824, under a limitation to heirs male in the original patent to Sir Thomas Erskine, created Earl of Kellie in 1619. He died in 1872. His successor, as thirteenth Earl of Kellie, was Walter Henry Erskine, who was held by a Committee for Privileges of the House of Lords entitled to an Earldom of Mar created in 1565. Such a Committee must be composed of Members of the House of Lords, and not more than 15, who may be different persons at the different sittings; but, as a matter of fact, essentially consisting of two or three Law Lords and the Chairman of Committees. After a laborious and costly litigation in the House of Lords, extending over eight years, from 1867 to 1875, the Committee for Privileges, practically consisting of three Members, namely, Lord Chelmsford, Lord Redesdale, and Lord Cairns, fell into as gross and lamentable a blunder as was ever committed by any tribunal presided over by men most unquestionably anxious to do justice to all the parties interested. The proof of this proposition will appear at a later stage of this article.

In England the Sovereign is the supreme Judge in English Peerage cases. But, to decide a right of Peerage as to England, Scotland, or Ireland, after a Petition to the Crown and a Reference to the House of Lords, is now almost universally acknowledged to be the exclusive privilege of the Committee for Privileges of that House. By the present practice, the Report of the Committee for Privileges

s now, to all intents and purposes, a final judgment—though not formally a judgment at all—and the jurisdiction of the Sovereign has been superseded by that of the Law Lords. As a matter of ordinary procedure, English and British Peers petition the Sovereign to issue a summons to them after the death of their ancestors. But, since the Union between England and Scotland, no such summons is requisite in Scotch Peerages, and Scotch Peers succeed to their ancestors *jure sanguinis*. On a petition by an English or British Peer, the Crown, on the advice of the English Attorney-General, and with the sanction of the English Lord Chancellor, grants the prayer of the Petition, or may refer complicated cases to the House of Lords to examine the allegations of the Petition, and inform Her Majesty how the matter appears to them, and she acts, or should act, according to her discretion upon the Report of the House of Lords. Till the time of King Charles II. special Commissions of Inquiry were appointed in difficult Peerage cases.

Down till after the Union, and, indeed, till the middle of the last century, the Court of Session had, and, as I hold, still has jurisdiction in all claims to Scotch Peerages; for that Court has never been clearly, deliberately, and legislatively deprived of its jurisdiction in such matters. But, in 1730, a petition was presented to the King, in the Somerville Peerage case, and referred to the House of Lords, and investigated by the Committee for Privileges of the House, and reported upon by the House to the King, all in conformity with the practice long established by custom in English Peerages, and this practice has now been established by custom in all cases of complicated and disputed Scotch Peerages. But, be this as it may, still, notwithstanding the opinions of several noble and learned Lords, I must venture to assert that the House of Lords has no original jurisdiction in any matter of Civil right whatever

in a claim to a Peerage, or in any other Civil matter; and, further, that its jurisdiction as to Peerage claims is wholly derived by References from the Crown. I must also venture to assert that the English rule of presumption, adopted by the House of Lords in the Cassillis and Stair cases in 1762 and 1771 (1) in favour of heirs male and against heirs female, when no Patent of peerage was known to exist to the contrary, and (2) against a resignation of a *Comitatus*, and against the validity of a Re-grant by the Crown following thereon, were in violation of the Law of Scotland. In the Wiltes case, Lord Chelmsford advised the Law Lords to abandon the rule of interpretation of 1771, and admit the Law of Scotland, with all its consequences, as to Scotch Peerages. But they had not the courage to act on his advice. If they had had the courage, there probably never would have been the blunder in the Mar Peerage in 1875, or the necessity for the Mar Restitution Act of 1885.

The ancient Earldoms of Scotland were all territorial. But like all Scotch Peerages they are now, with one exception, personal in the blood, and are inherited *jure sanguinis*, whether there be lands annexed to them or not. Originally, they were semi-independent sovereignties or principalities, and were all gradually subjected to the ancient Kings of Scotland. After the introduction and spreading of Feudalism into Scotland, the ancient Earls exercised quasi-regal or Palatine authority, and by their tenants and officers, in imitation of the Feudal Sovereigns, held Courts of Law and even Local Parliaments for all public matters and legal disputes arising within their territories. Robert the Bruce, no doubt, introduced the Norman preference of Heirs male into his grants of *Comitatus* and regality, and, in this respect, the Stuarts followed his example. But this preference was not general in the 12th, 13th, or 14th centuries; and resignations of *Comitatus* and re-grants by the Crown to a different series of heirs took place in the 15th and 16th centuries.

The Scotch Feudal and Scotch Peerage Law unquestionably bear striking resemblances to the English Feudal and English Peerage Law; but analogies must not cause us to suppose that they involve identity. For example, a peerage as inherent in the blood was unknown in the Law of Scotland till 1587, when the great body of feudal barons had been deprived of their right to sit in the Scotch Parliament, except by election and representation, unless they were Dukes, Earls, and those Barons who were styled Lords of Parliament. When Queen Mary granted a Charter of the *Comitatus* of Mar in 1560 to her half-brother as Earl of Mar, a seat in Parliament was specially provided for him. In the Oliphant case, decided by the Court of Session in 1633, it was held that dignities were not *in commercio*, and required no seisin or infeftment, and no writ to perfect them in law; and that they were inherent in the blood of the first grantee, and went, in the case tried before this Court, to a daughter, and not to a cousin and male collateral of the late Lord on his Resignation to the Crown. Therefore, in deciding on Scotch Appeals in the House of Lords, and on Scotch Peerages in the Committee for Privileges of that House, the Laws of Scotland, as they existed at the time when the rights in question emerged, should determine the rights of the parties interested, and can alone Constitutionally so determine them. That the history of the Law of Scotland was not more fully explained to the Committee for Privileges on the Mar Peerage was a cause of regret to Lord Redesdale, and was, as I think, one of the chief reasons for the success of the late Lord Kellie, and the defeat of the present Lord Mar.

If, then, the ancient Peerage was restored, as it has since been held to have been, in 1565, no new Peerage, I submit, was or could have been created in that year by Queen Mary. Hence the Resolution of 1875, to be afterwards referred to,

passed in error, and everything that has followed upon it are founded in error; and, by the eternal laws of Justice and Equity and in further pursuance of the partial justice done in 1885, ought to be declared by the British Parliament to be null and void. Nay, more, if this be so, the order of the House of Lords on the 26th of February, 1875, and addressed to the Lord Clerk Register of Scotland, being passed before the sanction of the Crown was obtained to that Resolution, and everything else springing out of the same mistake, ought to be declared null and void by the same authority. I hold that the House was *functus officio* as soon as the Report of the 26th February, 1875, was ordered to be made to the Queen. The House of Lords has no jurisdiction to deal with the Union Roll of Scotland. I am aware that Lords Redesdale, Chelmsford, Cairns, and Selborne, and other noble lords designated the Resolution of 1875 as final and irreversible, or as Lord Cairns cautiously stated his opinion, final and irreversible as regards the House of Lords. As we shall find hereafter this Resolution was not absolutely final and irreversible. The fact is that the House of Lords has no original jurisdiction in such measures, and has no Legislative power by itself in any matter whatever. The Sovereign is, in fact, the Supreme Arbiter in all disputed Peerage Claims, and she should be advised by her Constitutional advisers to exercise the prerogative right which belongs to her in Peerage Claims. The Laws of Scotland are a sacred inheritance, and ought to be maintained inviolate. To submit to the laws of the land is one of the first and highest duties of a good citizen; and to enforce them is one of the first and highest duties of the supreme governors of any country. Truth and Justice are justly ranked among the highest attributes and noblest characteristics of mankind.

Nearly a century passed away before the Attainder of 1715 was abrogated and repealed as regards the Mar

dignity and honours. The Act of Restoration in 1824 was in favour of John Francis Erskine of Mar, to the Earldom of Mar. It proceeds on the preamble that he was the grandson and lineal representative of the Earl of Mar attainted in 1715, and enacted "that the said John Francis Erskine of Mar, and all other persons who would be entitled after the said John Francis Erskine to succeed to the honours, dignities, and title of Earl of Mar, in case the said Act of Attainder had not been made, be, and are hereby restored to the Honours, Dignities, and Titles of Earl of Mar." It also provided that it should not confer any right to any property barred or excluded by the said Act of Attainder. This restored Earl of Mar died in 1825, and was succeeded by his son, John Thomas Erskine, Earl of Mar, who died in 1828, and was succeeded by his son, John Francis Miller Erskine, Earl of Mar, who died in 1866. After the death of John Francis Miller Erskine, Earl of Mar, his elder sister's son, John Francis Erskine Goodeve Erskine, was, on the 13th February, 1867, served as "one and the elder of the two nearest and lawful heirs portioners in general of John Francis Miller Erskine, Earl of Mar, Lord Garioch," &c., "his uncle," and from the first assumed and used the title and style of Earl of Mar. But his second cousin, Walter Coningsby Erskine, who, as I have said, rightly succeeded to the Earldom of Kellie in 1866, as heir male, at or about the same time took possession of the Mar estates also as heir male to the Erskines, and very soon thereafter, in 1867, petitioned the Queen for the title, dignity, and honours of Earl of Mar as heir male of an Earldom alleged by him, and afterwards held by the Committee for Privileges of the House of Lords, to have been created by Queen Mary in 1565. He died in 1872, and was succeeded by his son, Walter Henry Erskine, Earl of Kellie. (*Vide, Ante*, pp. 65 and 66.)

Upon the Earl of Kellie's petition, which was referred for opinion and advice by the Queen to the House of

Lords, on the 23rd May, 1867, and by the House to its Committee for Privileges, and in which Goodeve Erskine, the heir of line, was allowed to appear as a Commoner, and as an opposing petitioner, the Report of the Committee was in the following terms:—"That it is the opinion of this House that the Claimant, Walter Henry, Earl of Kellie, Viscount Fenton, Lord Erskine and Lord Dirleton, in the Peerage of Scotland, hath made out his claim to the honour and dignity of Earl of Mar in the Peerage of Scotland, created in 1565." The Report is dated the 25th February, 1875, and was reported to the House of Lords on the 26th of the same month and year, and ordered by the House to be laid before Her Majesty the Queen. On the 26th February, 1875, and before the Queen's approval of the Lords' Resolution had been obtained, an order was sent by the House of Lords to the Lord Clerk Register of Scotland ordering him to receive the vote of Lord Kellie as Earl of Mar on the Roll of Scottish Peers. In this way, the Earl of Kellie had, for a time at least, precedence over eight Earls created before the year 1565. This Report was commonly supposed at the time and for some time afterwards, erroneously, yet not strangely, to have practically extinguished the ancient Earldom of Mar. No wonder; for it was based on this extinction being necessarily true. If their lordships had been of opinion that an ancient Earldom existed, they never could have come to the conclusion that a modern one was created in 1565, unless on very strong evidence, which has never been produced.

The Report and Resolution were opposed to the universal opinion of the greatest lawyers of Scotland before the Union, and also of Kings, Parliaments, and the Supreme Civil Courts of Scotland for centuries. How very strange that all these should have been wrong, and that three noblemen, two of them English lawyers, great and impartial though

they were, yet unversed, unless at second hand, in the laws and customs of Scotland, should have been right. *Humanum est errare.* In the Mar Peerage case in 1875, very wise men did err egregiously. How they fell into error need not be here discussed at any length; for the error has been partially corrected, and will, I hope, be hereafter corrected wholly. I may state, however, that their fundamental error sprang from the fact that they did not know that, as a rule, and without specific words, and till a considerably later date than 1565, a Charter of *Comitatus* in Scotland conveyed the title annexed to the fief; and that, in Scotland, the presumption under such a Charter is not in favour of heirs male, but of heirs general. Not a single Patent of peerage was produced to the Royal Commissioners for the ranking of the Peers in 1606, and not one existed. Personal dignities were unknown in Scotland in 1565. From 1639 to 1847 the Earls of Mar protested for higher precedency than they received. For centuries they have always claimed to be the premier Earls of Scotland.

As a Mar peerage was known to have been in existence in the memory of the present generation, and to have descended to the son and to the grandson of the Earl restored in 1824, and as a Mar peerage was also known to have been restored by Queen Mary in 1565, and to have been forfeited in 1715, and to have been, at various times, inherited and possessed by females, between the time of Gratney, Earl of Mar, and the 15th century, the conclusion of the Committee for Privileges to the effect that the Earldom of Mar was limited to heirs male astonished everyone who knew anything about the laws and history of Scotland. No one took up the opposite view more fully, keenly, or ably than the late Earl of Crawford, who, in 1882, published an exhaustive Treatise on the Earldom of Mar for 500 years, and proved, beyond the shadow of a doubt, that the learned Law Lords in the Committee for Privileges of the House

of Lords fell into error in holding—(1) that the ancient Mar Peerage became extinct late in the 14th century; (2) that the Mar Peerage of 1565 was a new creation, and not a restoration by Queen Mary; and (3) that the existing Mar Peerage was limited to heirs male only. As I have already given a long sketch of the History of the Mar Peerage from 1014 up to the present time, and have, I think, shewn by my simple narrative, and by such proofs as could be produced in this Article, that the Earl of Crawford was right in condemning the conclusions upon which were based the Report of the Committee for Privileges on the Mar Peerage in 1875, therefore, I do not propose to consider the arguments adduced by him for his conclusions, or by the learned Law Lords for their conclusions. The British Parliament has already intervened in this great dispute, and has largely removed the injustice inflicted on John Francis Erskine Goodeve Erskine, as regards the title, dignity, and honours of the ancient Earldom of Mar by declaring that he is heir and successor of the ancient Earls of Mar.

This act of justice is called "The Earldom of Mar Restitution Act" (1885), declares that it does not prejudice the right of the Earl of Kellie, or any other person as to any lands; and has for ever destroyed the assumption that the ancient Peerage of Mar is not in existence. It contains reservations as to the validity of the Resolution of 1875 of the Committee for Privileges, and also as to certain "lands or heritage in Scotland or elsewhere," and all evidently intended to affirm the validity of the said Resolution, which, if it did anything, created a new and second Earldom of Mar, and also to protect the "Earl of Mar and Kellie" from any claims which might thereafter be made by the "Earl of Mar" to the estates attached to, or conferred upon, the ancient Earldom of Mar. These reservations ought never to have been inserted in the Act of Parliament of 1885, and ought yet to be abrogated so

as to leave all parties to their legal rights, without any restriction whatever. After and since this Act of Parliament, Walter Henry Erskine, thirteenth Earl of Kellie, continued to call and style himself "Earl of Mar and Kellie" till his death, about two months ago, when his son, the fourteenth Earl of Kellie, assumed the same style as his late father. Thus we have two Earls of Mar in Scotland at the present moment.

Here we are confronted by a dilemma. If the Committee for Privileges were right in their conclusions, the ancient Earldom is extinct. If Parliament is right in its conclusions, the modern Earldom, which was built up on the assumption that the ancient Earldom was extinct, then this modern Earldom of Mar, supposed to have been created in 1565, never was so created, and therefore cannot belong to anyone. If there was no such creation, a new or second Earldom of Mar is impossible, and *ultra vires* of any power or authority known in the present British Constitution; for, by the Articles of Union between England and Scotland in 1707, no new Peers of Scotland were to be created at any time thereafter. Consequently, the Report by the Committee of Privileges of the 25th February, 1875, and of the House of Lords of the 26th of the same month and year, and the subsequent sanction of Her Majesty the Queen, and all orders given in consequence thereof, or of any of them, to the Lord Clerk Register of Scotland as to the voting or ranking of the "Earl of Mar and Kellie" at the Election of Peers for Scotland are contrary to the said Articles of Union and the just rights of the People of Scotland, and should be declared to be illegal and void to all intents and purposes.

As in my Article on "The British Peerage, and Jurisdiction and Procedure of the House of Lords as to the Peerage," and published in the *Law Magazine and Review* for February, 1883, No. CCXLVII., I have fully explained the

Decreet of Ranking in 1606 as to the Precedency of the Scotch Peers, and also the general nature of British and Scotch Peerages; I will not here discuss these matters, but would refer the reader to that Article for a full explanation of my then opinions in regard to them. I shall merely here observe that, with the exception of thinking that a less complicated and less expensive mode of enquiry than is there suggested is possible and desirable, I adhere to it.

I now submit to the reader that I have proved the first and second propositions with which I started at the commencement of this Article, namely:—(1) that the Report of the Committee for Privileges of the House of Lords as to the Mar Peerage in 1875 was founded on gross and serious errors; and (2) that these errors have not been wholly removed by the Act of Parliament passed in 1885. As these two propositions are inextricably interwoven, I have been obliged to treat them together. I hope, however, that I have discussed both of them in such a way as to have shewn clearly that both propositions are absolutely true and irrefragable. If further proofs be thought necessary they can be produced in abundance, and will be found at large by the reader in Lord Crawford's book to which I have already referred, and to which I am largely indebted for the most of any special knowledge which I myself possess as to the Mar Peerage. I have purposely and necessarily omitted many points upon which I might have enlarged in support of my contentions. I now propose to consider my third proposition, which, the reader will remember, was that the decision in the Court of Session in 1873, and affirmed in the House of Lords in 1876, was conform to the Law of Scotland.

The forfeited lands and estates were purchased by James Erskine, Lord Grange, and by David Erskine, Lord Dun, who were both Judges of the Court of Session, from the Commissioners and Trustees for the sale of Forfeited

Estates in Scotland. The transaction in regard to them was completed by a Royal Charter, dated the 26th July, 1725, and Lords Grange and Dun were duly and lawfully seised in the said lands and estate on the 25th September of the same year. Thereafter, by Disposition and Deed of Entail, dated the 6th January, 1739, and recorded in the books of the Lords of Council and Session on the 16th February of the same year, Lords Grange and Dun executed a Disposition and Deed of Entail of the Mar Estates on the narratives therein mentioned, and in the following terms:—"Therefore witt ye us to have sold, annailzied and disposed, as we do by thir presents in implement, as said is, with and under the reservations, provisions, burdens, declarations, conditions, clauses, irritant and resolutive, underwritten, and no other wayes, sell, annailzie, and dispose from us, our heirs and successors, whomsoever, to and in favours of the said Thomas, Lord Erskine, and the heirs male lawfully to be procreat of his body; whom failing to the heirs whomsoever descending of the said Thomas, Lord Erskine, his body; whom failing to Lady Frances Erskine, his sister, and the heirs male to be procreat of her body; whom failing to the heirs whomsoever descending of her body; whom failing to me, the said James Erskine; whom failing to the nearest agnate of the said Thomas, Lord Erskine, of the sirname of Erskine; whom failing to the said Thomas, Lord Erskine, his heirs and assignees whomsoever heretablie and irredeemablie, without any manner of reversion, redemption, or redress whatsomever, the eldest heir female and the descendants of her body, excluding all other heirs-portioners, and succeeding always without division through the whole course of succession in all time coming, with and under the condition," &c., thereinafter-mentioned, "All and Haill the Earldom of Marr, which sometime belonged to John, late Earl of Mar, in so far as the same has not been disposed

and alienated by us, and now comprehending the lands, lordships, baronies, and others," thereinafter-mentioned. Such are the words of the destination. I must now quote the words of one of the most important provisions in this Disposition and Deed of Entail. They are as follow :—" As also with this provision allwayes, like as it is hereby expressly provyded and declared that the eldest female heir of tailzie above specified and the descendants of her body, shall exclude the younger and her descendants as heirs portioners, and shall succeed allwayes without division; and that the whole heirs of tailzie above-mentioned, as well male as female, and the descendants of their bodies who shall happen to succeed to the said lands and estate by vertue of the foresaid destination, shall be obliged in all time after their succession to assume and constantly use and bear the sirname of Erskine, and take and carry the armes which, before the attainder of the said John, late Earl of Marr, were worn by the family of Erskine of Marr, in so far as the same, or any part thereof, can be obtained, and legally and warrantablie borne, and in case the attainder of the said John, late Earl of Marr, shall be reversed, the title, dignity, and honours of the family of Erskine of Marr and the armes thereof, as their own proper sirname and armes in all times thereafter." This disposition contains provisions against altering the order of succession, and as to declarators, adjudications, services, and retours as against persons violating its terms, and various other clauses which do not need to be here quoted, explained, or discussed. It also states that the Tower of Manour-place of Alloa, or any other part or portion of the lands therein mentioned, being the place appointed by a Charter under the Great Seal in favour of the Grantors, shall be the place for taking sasine of the said lands, Earldom, lordship, and estate of Mar.

As I have already stated, Thomas, Lord Erskine, died

without issue in 1766. He was then succeeded in the Mar lands and estate by his sister, Lady Frances Erskine, who died in 1776. She was succeeded in the Mar lands and estate by her son, who died in 1825. He, as I have stated, succeeded to the honours, dignities, and titles of Earl of Mar in 1824, and was succeeded by his son, and thereafter by his grandson, in the Mar estates and dignities. This grandson of the Lady Frances, who died in 1776, was survived by John Francis Erskine Goodeve Erskine, now Earl of Mar, and also by Walter Coningsby Erskine, who succeeded to the Earldom of Kellie, created in 1619, with a limitation to heirs male. John Francis Erskine Goodeve Erskine was heir general to the ancient Earldom of Mar, and was also heir male of his mother, Lady Frances, who, if she had survived her brother, would have been one of the heirs portioners of the late Earl of Mar and Kellie, who died in 1866. He was not heir male of his great-great-grandmother, Lady Frances; for an heir male must succeed through males, but, if at all, Lord Mar must inherit through a Lady, his mother, Lady Frances. Walter Coningsby Erskine, Earl of Kellie, had a double connection with the Mar family; for he was descended from Lord Grange, a younger brother of the Earl of Mar, attainted in 1715, wholly through males, by a younger branch of the family than Goodeve Erskine, and he was also descended from his great-grandmother, Lady Frances, upon whom, failing her brother and her brother's issue, the Mar estates were settled in the manner already quoted. In 1866, he was, therefore, heir male of the attainted Earl of Mar, and also of Lady Frances Erskine. If his grandfather had not married Lady Frances, he could not have been heir male of Lady Frances. This marriage between two cousins has had some strange and unexpected results in regard to the devolution of the Mar estates; for it has accelerated the rights of Lord Grange's own male heirs to the Mar estates, and postponed, and possibly defeated, the rights of the

heir general under the Deed of Entail of 1739, and in direct opposition to the ancient devolution of the Mar estates. The reader will, therefore, not be greatly surprised to learn that a litigation arose in the Court of Session between John Francis Erskine Goodeve Erskine, Earl of Mar, as the heir general of his maternal uncle, and Walter Henry Erskine, thirteenth Earl of Kellie. The questions thus raised are questions of pure Scotch law, and must be determined on a legal interpretation of the Deed of Entail of 1739. The conclusion at which I have arrived is that the twelfth and thirteenth Earls of Kellie were, and that the fourteenth Earl of Kellie now is entitled to the Mar estates under the destination in that Entail as heirs male of the Lady Frances, who died in 1776. I refer to the foregoing pedigree in proof of this assertion, as to which no lawyer, acquainted with the law of descent of Real Property in England, or in Scotland, can have any doubt whatever.

From the words quoted as to the destination, and as to the surname, arms, and dignities, I have not the slightest doubt that the grantors of this Deed of Entail, which was executed before the marriage between Lady Frances and a son of Lord Grange, thought and intended that the Mar dignity and the estates would go together, and be inseparably connected. But, unfortunately for the heir general, and fortunately for the heir male, of Lady Frances, the words of the destination will not, and do not, carry out that intention into legal effect. Probably the marriage between the two cousins was intended by Lord Grange, and possibly by Lord Dun, for the express purpose of uniting the two branches of the family, and keeping the estates and the dignities in the male line of the Erskines. Be these conjectures as they may, the grantors have, for the present, effectually settled the Mar estates on the Heirs male of Lady Frances, and the old rule as to the descent of the ancient Earldom of Mar has effectually given the Mar dignity to the heir

general. The Mar estates are not, as I hold, settled on the possessors of the ancient Earldom of Mar, but on a certain series of heirs of tailzie or provision specified in the Deed of Entail of 1739. To have effected an absolute conjunction and union of the estates, the words of destination in that Deed should have been the same as in the Charter by Queen Mary in 1565. In the latter Deed, the words of destination are to the restored Earl and his heirs and assignees; and these words are not altered in restoring the honours by the Acts of Parliament passed in 1824 and 1885 in favour of the heirs general. But the reader, on referring back to the words of the destination in the Deed of Entail will find that they are very different from a destination to heirs general. He will observe that the heirs of provision are Thomas, known as Lord Erskine, and his heirs male, procreated of his body, whom failing to the heirs whomsoever descending of his body; and then to Lady Frances, his sister, and the heirs male procreated of her body; whom failing to the heirs whomsoever descending of his body; whom failing to James Erskine and others, as already quoted.

Under such a destination, and in the event which happened by the death of Thomas, Lord Erskine, without issue, the law of Scotland is clear that all the heirs male of Lady Frances exclude, in the first instance, all her heirs female, or male heirs descending through females; or, in other words, that her heirs male, and their descendants must be extinct before the heirs female and their descendants can, under the words "whomsoever," inherit the Mar estates settled by the Deed of Entail of 1739. Lord Thomas having died without issue, the inheritance opened up to Lady Frances on her brother's death in 1766, and descended through her on her male descendants in one and the same and the elder male line of her body down to the Earl of Mar and Kellie, who died without issue, in 1866. What,

thereafter, is the course of succession by the law of Scotland, as settled by all the great Institutional writers, and a long list of precedents in Scotland ? Clearly, it is to any and all the heirs male, descending from Lady Frances, who died in 1776, and upon whom, and upon whose heirs male, after her brother's death without issue, the Mar estates were primarily settled in 1739. This heir male was Walter Coningsby Erskine, twelfth Earl of Kellie, whose heirs male and direct descendants were his son and grandson, the thirteenth and fourteenth Earls of Kellie. This is the natural and necessary legal interpretation of the words of the destination in the Deed of Entail, which substituted a certain series of heirs for the heirs general in the Mar estates. To give any other interpretation to the words of the destination would be to overthrow one of the cardinal rules of Real Property Law in Scotland. That a new, or exceptional, interpretation can be allowed in the Mar estates would be contrary to law and sound policy. Even supposing the late Earl of Mar and Kellie, who died in 1866, had left a daughter, she would not have succeeded to her father in the Mar estates under the Deed of Entail; because the twelfth Earl of Kellie was the heir male of Lady Frances, who died in 1776. She could only have succeeded to such lands as heir general, if and after the Mar estates had been disentailed. What applies to such a daughter, applies equally to the present Earl of Mar, who is the nephew of the late John Francis Miller Erskine, Earl of Mar and Kellie.

Further, under this Deed of Entail, a female is not wholly excluded ; but each, in her order of seniority, is to take the settled estates, and enjoy them without partition, and hand them on to her descendants as an inheritance entailed on her heirs male, whom failing on the heirs whomsoever descending from her body. Suppose, for example, that Lord Thomas had had a daughter, her

descendants would have excluded Lady Frances and her descendants from inheriting the Mar estates till such daughter and her descendants were extinct. So, again, in the event of the heirs male of the Earls of Kellie failing, the Mar estates will fall to the heirs female in the order of their seniority before the inheritance falls, under the Deed of Entail, to the heirs male and heirs whomsoever of James Erskine. As I have already pointed out, the heirs male of James Erskine are now already enjoying the Mar estates in preference to the " heirs whomsoever " descending from Lady Frances. I do not consider that the words "lawfully to be procreat" add anything to the words " heirs male of her body" to help the Earl of Mar as heir general; for, in succession to Real property, heirs must be lawfully procreated, and such words have long been established as meaning not only the sons of a person named, but all the male descendants of such person in the order of succession. No doubt, heirs male procreated of a person strictly would mean of that person, and of no other. But the legal or technical meaning is more extensive, and comprehends all heirs male descending from such person. Sometimes, although not in this instance, the destination is to A. and his heirs male, and the heirs male of such heirs male. The words here expressed are comprehended in legal, technical language under the words used in the Deed of Entail, and naturally so in order to carry out its evident intention.

I have been struck with the facts that Lady Frances, who died in 1776, succeeded to her brother, in preference to the heir male collateral; and that, if the forfeiture had never been incurred and if the old rule as to the descent of the ancient Earldom had never been altered and had been allowed to stand as it was, a sister's son would have succeeded to the Mar estates in preference to the present heirs male of Lady Frances. I have also been struck with the fact

that the heirs referred to in a lost Back Bond, executed in 1725, and narrated in the Deed of Entail of 1739 are to the heirs of the body and not merely heirs male, &c., are in exact conformity to the line of descent of the ancient Earldom of Mar. But, then, it is settled law that such a Back Bond, even although now in existence, would not be allowed to modify the express words of the Deed of Entail of 1739. The Mar estates were, as a matter of fact, re-settled by the Deed of Entail of 1739, and until the estates are disentailed and re-settled, and the Deed of Entail got rid of in some way or another, they must descend, and be inherited, in conformity with the words of the destination, which is the leading clause in the Deed of Entail.

In regard to the provisions as to the using and bearing the surname of Erskine, and taking and carrying the arms of Erskine of Mar, and the dignities, if restored, of that family, I think that they would be implemented by the Tenants in tail male doing all they could to take and carry such name, arms, and dignities, and that their not doing so would not involve a forfeiture of the Mar estates, unless they could take and carry them; and yet refused so to do. But, then, in the event of any such refusal, a forfeiture by any heir of entail under the Deed of Entail would be merely personal, and does not affect the interpretation of the words of the destination in that Deed. That the Mar estates are necessarily entailed on the heirs to the ancient Earldom is a proposition which I for one cannot accept as law. Before the heirs general can inherit them, all the heirs male of Lady Frances must be extinct. I therefore have to come back to the conclusion with which I started on this branch of my Article, namely, that the decision of the Court of Session, affirmed by the House of Lords, in favour of the heir male, is conform to the Law of Scotland.

Want of space compels me to omit the quotations and references which I wished to make in support of my legal position on this part of my Article. I must content myself with referring the reader to Bell's *Principles of the Law of Scotland*, §§ 1655 to 1661; 1693 to 1704; and 1723 to 1726.

I must now further add that this decision, affirmed on appeal by the highest Court of Appeal in the Kingdom, and given by just, impartial, and proper tribunals, with all the parties before them, is final and irreversible, and binding on all the parties and their representatives. In this decision, no new principle of law has been introduced, no corruption can be alleged, no error as to facts can be proved. I therefore hold that the decision should now be allowed by all parties concerned to take its course, and that the rights of all parties interested should be allowed to stand on the Deed of Entail, and the decision founded upon it. *Interest reipublicæ ut sit finis litium*. On this point, I quote the words of Lord Eldon in an appeal before the House of Lords. His words are these :—" A competent decision has removed out of the way all arguments and all principles so as to make it impossible to apply them to the case before the House." If such words are applicable to a case in which a mistake had been made in the highest Court of Appeal, they are much more applicable to a case in which no such mistake has been proved, but in which, through the alteration of circumstances or the weak-sightedness of men, or the blunders of ignorant conveyancers, a result, which is hurtful to some of the parties involved in a transaction which took place 150 years ago, has been reached in the ordinary course of Judicial decision and interpretation. If any blunder has been committed, or wrong done, upon any of the parties, it has been perpetrated by private and not public persons, and, if at all, should be remedied by the private persons concerned, and not by the exercise of the high prerogative functions of the State, when it is called

upon to see that justice is done to all its subjects. For the House of Lords to agree to the Earl of Mar's petition to the House of Lords on the 27th of June, 1887, and to "investigate into the connection between the Mar estates and the ancient dignity" would be impolitic, unconstitutional, and without precedent. It would be impolitic, because such an investigation would tend to unsettle minds as to the laws of Real Property in Scotland. It would be unconstitutional, because such an investigation would be a confusion of the Legislative and Judicial functions of the House. It would be without precedent, because no precedent for such an investigation can be found in the whole history of England or Scotland. If a legal injustice has been done to the heirs-general of the ancient Earldom of Mar by the ordinary Courts of Justice in the land, this wrong, from a national point of view, ought to be remedied by an Act of Parliament, and in the same way as the wrong done to them was remedied by Act of Parliament in 1885. Perhaps, such a course, some people might say, would not be without some degree of precedent in the history of Scotland; because, from the reigns of King James III. to King James VI. of Scotland, several instances exist of the Sovereigns revoking Tailzies or Deeds of Entail made in favour of heirs male of provision, and in violation of the rights of heirs general under the original Charters. But I am ignorant of any such revocations in any case of purchase and sale in the Law of Scotland. Grants of lands or dignities in Scotland to A. *et haeredibus suis* were grants to A. and his heirs general. Stair holds that where there are no special heirs of provision, the presumption is in favour of heirs general of line. Before the Mar heirs general can succeed to the Mar estates, all the services and infeftments in favour of the Kellie family since 1866 must be held to be invalid and contrary to law. According to the law of Scotland, as it

now stands, the Mar estates might be disentailed and settled on a new series of heirs, and put beyond the *spes successionis*, or even vested right of the heirs of the ancient Earldom of Mar.

No matter what the law of Scotland is as to the honours of the ancient Earldom of Mar, the question as to the Mar estates has now to be determined by the Deed of Entail of 1739 and the rules of interpretation applicable to that document. Females have succeeded, and may again succeed to the ancient Earldom of Mar; but the dignity of the ancient Earldom, and the right to the Mar estates may remain apart for ever, because males descending from Lady Frances may succeed one another in all future time. If, however, males of the Kellie family should fail, then, as I have already stated, the representatives of the ancient Earldom may, at some future time, join the ancient Earldom and the entailed estates, and keep them together for ever. But till such failure and union, the Earls of Kellie as heirs male are legally entited to enjoy the entailed lands according to the terms of the destination already quoted. No mere abrogation of the Resolution of the House of Lords in 1875 as to the title to the Earldom of Mar existing in the Earls of Kellie could have any effect on the right to the Mar estates under the Entail of 1739, and the decisions of 1873 and 1876.

I may here notice that the heir to the ancient Earldom of Mar does not, as indeed he could not, claim in his General Service of 1867, to be heir of tailzie or provision under the deed of Entail of 1739. An heir of provision should make up his feudal title by Special Service under the Deed of Entail or Provision. An heir of entail under the Deed of Entail of 1739 would be entitled to the whole of the Mar estates. This General Service of 1867 almost conclusively shews to me that the Earl of Mar did not know of the Deed of Entail of 1739, or that his legal advisers did

not know how to complete his lordship's feudal title to the estates as well as his right *jure sanguinis* to the ancient Earldom at one and the same time.

Since writing this article, I have been informed that John Francis Erskine Goodeve Erskine, Earl of Mar, has lodged an objection in the proper Court against the service of the fourteenth Earl of Kellie in the Mar estates. I have to confess that I cannot see, or imagine, any advantage as likely to arise from this proceeding. Service will, I imagine, be granted to the Earl of Kellie as his father's heir, and in virtue of the Deed of Entail of 1739, and the decision of the Court of Session in 1873, and affirmed by the House of Lords in 1876. So far as the Courts of Law are concerned, the right to the Mar estates falls under the principle of *res judicata*. No matter what blunders, if any, may have been committed hitherto by Parliament or the Courts of Law, the remedies now available to the Earl of Mar are (1) An action of Reduction and Declaration in the Court of Session in Scotland; or (2) an Act of Parliament in the Imperial Parliament at Westminster.

I have now come to the end of the present article on the Mar Peerage and estates; and have, as I hope, placed the legal and constitutional aspects of this great contest before the reader in a true and impartial light.

ALEXANDER ROBERTSON.

V.—ROMAN LAW AND THE SCHOOL OF BOLOGNA.

THE School of Bologna is closely associated in the minds of most students with the revived study of the Roman Law which the Twelfth Century saw, and has almost had the credit of initiating. The celebration at Bologna this summer of the eighth Centenary of the University

cannot but draw fresh attention to the relation of the School of Bologna both to the developed study of the Roman Law, and to earlier Italian and Transalpine Schools of Law, if such existed.

That a wave of renewed zeal for the Study of Roman Law passed over Europe in the Eleventh and Twelfth Centuries, is an undoubted fact. That a particular School, that of Bologna, for example, and a particular Teacher, Irnerius, as we have been told, initiated this movement, modern criticism and research seem alike to fail in establishing.

What does seem to emerge with a certain distinctness from the mist of ages is that, as we have before now maintained in these pages, the study of the Roman Law never died out of the West, and therefore never required to be re-planted, as was at one time thought. Irnerius, no doubt, watered, but he did not plant. That was the work of the men of past ages, the *prudentes* of old, so to speak, *quibus permissum erat jura condere.*

Beyond this comparatively firm ground, much is necessarily somewhat conjectural, and is a reasoning by inferences rather than from facts, as far as regards particular Schools and Teachers. Manuscripts are found with abbreviations and names which seem to indicate some earlier generations of Masters and Scholars than those whom we had been apt to reckon as the first. Questions regarding the relations of one School to another are easy to put and hard to answer. There may be doubts as to the substantive existence of a particular School or Teacher, when there can be none as to the existence of the Roman Law as a living subject of instruction in the Schools of the earlier Middle Ages, long before the wave of Learning associated with the Revival of the Eleventh and Twelfth Centuries. Some such revival was to be expected as a counter-eddy to the current which had led so many in Western Christendom to expect the end of

the world in the year 1,000. But behold! instead of the consummation of all things came the election of Gerbert of Aurillac as Pope, under the name of Sylvester II., and with him a tradition of Learning, for Gerbert was a man of Letters, yea, of Numbers, too, if not a Magician,—be it said with bated breath of the Infallible one,—a man acquainted certainly with Arab as well as European lore.

A Revival of Learning might therefore naturally be looked for at such a period, and undoubtedly such a Revival did take place, culminating in the Thirteenth Century.

Towards the establishing of the thesis that the Roman Law never died out of the West, much has been done by Professor Rivier, of Brussels, both in the interesting article which he devoted to this subject in Vol. I., No. 1, of the *Nouvelle Revue Historique de Droit* (Paris. Larose, 1877), and also in his valuable *Introduction Historique au Droit Romain* (Brussels. 1881); and other illustrations of the fact had been furnished in some interesting articles in the *Revue Générale du Droit* (Paris. Thorin), for 1885, dealing with the Gallo-Roman period and based on the correspondence of Sidonius Apollinaris. We are here, of course, only alluding to evidences for Western Europe, not to the separate evidences for Syrian and Egyptian Schools of Law, which have received the attention of Bruns and Sachau, and Dareste, and others.

For Southern Gaul, we have evidences at the date of the Barbarian invasions. For Western Gaul and Aquitania, we have them during that dark period, the Tenth Century, in the very days when barons were freeing their serfs, *appropinquante mundi fine.*

They could not carry their serfs with them into the next world, and their heirs might not live to possess them, so it did but seem natural to acquiesce in the suggestion, probably thrown out by the Chaplain, that it were good for the soul of the dying lord to set his thralls free.

From Orléans to Bologna is a far cry, but if there was a School of Roman Law at Orléans in the Tenth Century, as Professor Rivier seems to have established, might not the existence of such a School at Bologna have been argued *à fortiori?* For the source of the study of that science must have been ultimately Italian, and therefore we should ourselves postulate a School in Rome, even if there were no other than general grounds for the belief in its existence. It is, indeed, a somewhat shadowy School, as compared with others in Italy and elsewhere, but some evidences more than inferential exist both for the School of Rome and for that of Ravenna, though the existence of each has been questioned.

The Vatican *Summaries*, as they are called, belong to the middle and latter part of the Fifth Century, *circa* 438—456, and 448—476. This brings us to the period of the temporary cessation of the separate Western line of Emperors, commonly, but inaccurately, known as the Fall of the Roman Empire.

The Vatican *Fragments*, to be distinguished from the *Summaries*, belong to the age of Constantine, according to some Commentators. They were drawn up with a view to practice, says Professor Rivier, while the *Summaries* he considers to have been Notes of a Professor's Lectures in the School of Rome. And the Gaius of the Fourth or Fifth Century, inserted in the *Breviarium* by its compilers, also comes down to us as a relic of the teaching of Roman Law in Rome. The existence of the School of Rome is carried down by Professor Rivier to the middle of the Sixth Century, and a good deal later (*encore florissante au milieu du sixième siècle, et bien au delà.* Rivier, *Int. Hist.*, *u.s.*, p. 521).

Besides Rome and Ravenna, Professor Rivier shews us Pre-Irnerian Schools, in Pavia, from the Tenth Century,

as well as in Verona and Nonantola, and in Pisa from the Eleventh Century, to take account only of Italy. Of France (including the period when it was formerly called Gaul) we have already spoken. We may, therefore, we believe, fairly say that a case is made out for the existence of Pre-Irnerian study of Roman Law in the West, and indeed we do not see how it could well have been otherwise. If Bologna had created that study, it must have been dormant in Western Europe for several centuries. The difficulty of maintaining such a hypothesis appears to us far greater than that which may be held to exist from the want of any very definite knowledge of the early Mediæval Schools in Gaul and Italy.

The celebration of the Bologna Commemoration has naturally drawn forth various publications on the interesting questions in the history of Western Law which it involves. Among these we may note, as appearing in a quarter little likely to attract general attention in this country, an interesting Paper read before the Royal Academy of Sciences of Turin, by Professor Cesare Nani, Member of the Academy, at their meeting of 29th April, 1888 (and printed in their *Atti, XXIII. xi.*, for 1887-8), on a work by Avvocato Luigi Chiappelli, of Pistoia, entitled *Lo Studio Bolognese nelle sue origini e ne' suoi rapporti colla Scienza pre-Irneriana.*

The views expressed by Signor Chiappelli appear, from Professor Nani's abstract of them, to be in general harmony with those which we have stated as expressed by Professor Rivier and others, and which seem to us in the main the most probable.

That there was a Pre-Irnerian School of Roman Law at Bologna itself, as well as in other parts of Italy, Chiappelli clearly holds. That it had relations with the School of Pavia he holds to be proved by a common mode of citing the Sources and the Gloss, as well as by the

common study of the Lombard Law, commenced at Pavia and continued at Bologna. With the School of Ravenna the relations are less clear, but may be presumed, and that more particularly, through the *Exceptiones Petri.* We have already mentioned the doubts which have, unwarrantably we believe, been cast over the existence of the School of Ravenna as of that of Rome.

This thesis of Signor Chiappelli is in accordance with the views already expressed by him in a Paper read before the Turin Academy, and printed in their Transactions (*Memorie*), to which we may draw attention on a future occasion in further elucidation of this interesting question. For the question is of high interest in itself, as Professor Nani justly remarks, and at once of the greater difficulty and importance from the fact of its being bound up so intimately with the history of Culture. It is of high interest, moreover, from the names of those who have taken part on different sides. On the one side, attributing to Irnerius the glory of having himself re-lit the lamp of Learning in the West in the matter of Roman Law, we have Savigny, whose authority is so weighty and has so long prevailed. On the other side, reducing Irnerius to his proper position, as we believe, in the history of the devolution of a knowledge of Roman Law from Ancient times through the Middle Ages, we have Stintzing, Fitting, Ficker, Rivier, and others, down to Chiappelli, and their opinion had almost seemed to have taken the place of Savigny's, when Conrat comes on the scene with a modified theory, not altogether either Savigny's or that of his opponents. The Courts are open, therefore, and the adversaries are impleading before them. Justice is still holding the scales, though we must say we think the balance inclines towards the view of which Signor Chiappelli and Professor Nani are among the latest exponents.

The difficulty of the problem is freely admitted by Professor Nani, and we as readily admit it ourselves. We

are in presence, as Professor Nani justly remarks, of manuscripts of which it is extremely difficult to establish the date and the source. We are confronted by scattered and conflicting notices, in which Legend is found mixed up with History. What, asks the Turin Professor, is the intrinsic value of these manuscripts? Is it true they exceed in value even the *Institutes* of Gaius and the *Fragments* of Ulpian? The little that we know for certain of the School of Pavia, says Professor Nani, is mainly due to the *Expositio*. But who, he asks, shall tell us what is at best more than a probable conjecture concerning the School of Rome, whose existence he nevertheless admits to be certain, or the School of Ravenna, whose existence he considers less certain? On these latter points we have already indicated our own opinion to the effect that both Rome and Ravenna had Schools of Law, but the source of the Learning of Ravenna may well have been the New Rome rather than the Old, and that circumstance has, perhaps, not been sufficiently considered. Again we may ask, with Professor Nani, whether the chief seat of Early Mediæval Roman Law was at Rome or elsewhere in Italy, or whether it was in Gaul.

These, and many more, are all open questions, says Professor Nani. We have to await their solution, through much patient investigation, and we may yet have long to wait. Meanwhile, we may fairly admit, with the Turin Professor, that the clash of conflicting views has already produced good results and that more such may be expected. The points in dispute are being gradually narrowed down within a small space, and the facts which may be regarded as fully established are of the highest importance. The advanced Study of Roman Law in Pre-Irnerian times is now established beyond doubt, says Professor Nani, and for this we have to thank what he calls the New School. But it is not yet established, he considers, that this study,

advanced though it was beyond what had originally been credited, was based upon the Pandects. And if not based upon the Pandects, whether their text was known or not, did it not miss the best and most luminous portion of Roman Legal Science? These are some of the questions which Professor Nani regards as awaiting and requiring solution before we can thoroughly master the condition of the Study of Roman Law in Western Europe before Irnerius. His own belief is that the Revival in the Eleventh Century, with which the name of Irnerius and that of the School of Bologna are alike so closely associated, was a change of method of study, not the resurrection of a long dead Past. The School of Bologna was the heir of Early Mediæval Schools of Roman and Lombard Law, but she does not appear to have been the heir of a rich heritage.

Quarterly Notes.

The Political Code of the Netherlands.

M. GUSTAVE TRIPELS, of Maestricht, an advocate at the Dutch Bar, who has already done good service to the student of Comparative Jurisprudence, by his translation of the Dutch Codes, proposes, we are glad to see, to confer an equal benefit on the student of Comparative Politics by his French version of the Political Code of his country (*Code Politique des Pays Bas.* Maestricht. J. Germain, 1888). What is a Political Code, it may be asked? And in a non-Code country, like ours, the question would not be an unnatural one. It may, we think, be sufficiently answered by a brief outline of the subject-matter of the proposed work of M. Tripels. The book opens (after an Introduction

by the translator, of course) with the Fundamental Law of the Kingdom of the Netherlands, which has lately been revised, the text of the modifications having been passed on the 6th and published on the 15th November, 1887.

The existence or non-existence of Fundamental Laws has been a subject much under discussion in our own country of late. In the Netherlands, at any rate, it is not open to discussion.

The Fundamental Law of the Kingdom regulates— 1. The succession to the Throne. 2. The Crown Revenues. 3. The guardianship of the King in Minority. 4. The Regency, when required. 5. The Inauguration of the King. 6. The Powers of the King. 7. The Council of State, and the Ministries, in their several departments. It then passes to the States-General, and regulates the First and Second Chambers respectively, and enunciates the dispositions of the Law common and the two Chambers. The next points embraced are the Legislative Power and the Budget. Then follow the Provincial States, their composition and attributes, and the Commercial Administrations.

We then pass to the Judicial Power, and there come under review in succession—the Administrations of Worship, Finance, National Defence, the *Waterstaat*—a most important Department in that Hollow Land which lies almost entirely below the level of the North Sea,—Public Instruction and Charitable Institutions. The Law of the 6th November, 1887, containing the revisions of the Fundamental Law passed by the Chambers, is then given, and M. Tripels carries us on to the Electoral Law of 1850, with the modifications involved by the Revision of the Fundamental Law and those of the Law of the 30th December, 1887. The Electoral Law regulates election to both Chambers, and the *Formulæ* prescribed by Law are given in accordance with Arts. 52 and 67 of the Codes.

The Council of State forms the next important subject, and has a chapter in which is set forth its composition, the functionaries attached to it, and the Jurisdiction of the Council. Another chapter is devoted to the *praxis* of the subject, the *Modus tenendi Consilium*, so to speak, of the Netherlands. The very important subject of Ministerial Responsibility is then dealt with by the publication of the text of the Law regulating it, as now subsisting under the recent Revision.

The Provincial States have also a chapter to themselves, embodying the regulations concerning membership, capacity and incapacity, functions when elected, &c., as well as the Royal Commission, the Clerk, and another chapter for the Sittings of the States and their attributes, the Laws and Royal Orders (*Arrêtés*), to be put in force by them, the suspension and revocation of their own Decrees (*Décrets*), and other matters.

The Communal Law of 29th June, 1851, with its various revisions to date is then given, and has chapters devoted to Communal Legislation, the compositions of the Communal Council, the Powers of the Communal Administrations, the daily Administration of the Commune, the Communal Budget, &c. Another very important part of the field embraced by M. Tripels, in his *Political Code*, is the Legislation concerning Aliens, under which head he gives the Law of 13th August, 1849, regulating the admission and expulsion of Aliens, in accordance with Art. 4 of the newly-revised Fundamental Law. No less important is the Law on Extradition, of 6th April, 1875, in accordance with the Article just cited. This branch of the subject is completed by a table of the Extradition Treaties concluded by the Netherlands down to date, and the text of the Law of 4th June, 1858, regulating the admission of Aliens to functions of the State, conformably with Art. 6 of the revised Fundamental Law.

Intimately connected with the question of the position of the Alien is that of Naturalisation, which follows in the text of the Law of 28th July, 1850, determining who is a Dutch subject, and regulating Naturalisation. The very valuable rights embraced under the heads of combination (*Association*) and Public Meeting (*Réunion*) are then dealt with in terms of the Law of 22nd April, 1855, in conformity with Art. 9 of the revised Fundamental Law.

We need scarcely point to the position held by Company Law among us, more especially since the great developments given to it by Limited Liability, or by the still burning questions raised by the action alike of private individuals, and of the Metropolitan Police, in connection with Trafalgar Square meetings, to enhance the importance of this portion of the Dutch Political Code.

We next come to Expropriation for Public Utility, and are not surprised to find that the Law of 28th August, 1851, with its modifications in later Legislation, is concerned, amongst other things, with that safeguard of the Netherlands,—the Dykes. But the Law also contains useful provisions for the case of Epidemics, and other suitable causes for Expropriation, with regulation of the indemnities to be allowed, and also covers the case of War, and of Fire and Flood.

It is, perhaps, somewhat curious to find ourselves passing from Expropriation for Public Utility to Copyright; but such is the transition in the scheme of M. Tripels. The justification for the apparent eccentricity, we presume, in so far as it may be needed, consists in the fact that Copyright is a right secured to the Author by the State, and is, therefore, a Political right. We have touched upon this interesting question so often in the pages of this *Review* that we merely draw attention to the fact that it forms an integral part of the work of M. Tripels, and express our pleasure that the Dutch Law will henceforth be so readily accessible.

Closely connected in many ways, through Treaty relations, though not perhaps in strictly scientific relations, we have another important subject, that of Trade Marks and Industrial Protection, regulated for Holland by the Law of 25th May, 1880, as modified by the Law of 22nd July, 1885.

The scheme of the work concludes with the Legislation on Public Worship (*Culte*) and Public Charity (*Assistance Publique*). The latter subject takes in Vagrancy and Mendicity, as well as the regulation of Benevolent Institutions. It is a large and important field for the judicious operation of judiciously-framed Laws. The country of the very interesting colonies of Frederiksoord and Willemsoord, and other kindred establishments, has a right to speak on this subject with authority, and we are glad that a place should be found for it in so valuable a work as that of M. Tripels.

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Railway Legislation, U.S.A., and the Inter-State Commerce Act.

Legislation in Railway Matters cannot but affect a very large portion of the Community in any given country, and in these days it is sure also to affect a large proportion of Aliens. On these grounds alone it is a subject of International, rather than merely National, interest, and claims our attention wheresoever originating. The numerous and important bearings of this question have been duly noted by Mr. J. Swann, M.A., whose book, modestly entitled, *An Investor's Notes on American Railroads* (New York and London. G. P. Putnam's Sons. Second Edition. 1887), was brought to the knowledge of our readers on its first appearance. We are not surprised that the passing of the Inter-State Commerce Act and Alien Act should have found him preparing a second edition for press, and we are glad that he has devoted some space to their consideration.

These fruits of American Legislative activity for the year 1887 deserve careful study at the hands of the foreign investor in American Railways or lands, and Mr. Swann's book will come in most usefully to help him to just conclusions. They also deserve the careful scrutiny of the student of Constitutional Law from their very important bearing on questions of the highest interest to that branch of Jurisprudence, and from these points of view we shall hope to return to their consideration.

Any one who had either, like Mr. Swann, studied the question on its own soil, or like ourselves had read something of current American Literature upon it, as set forth, for instance, in *The Forum* (New York. Forum Pub. Co.) and other organs where the views of conflicting parties are represented, must have realised that Legislation of some sort was impending. But of what sort ? It is to be feared that what has come to pass is not of the best kind. Railway Commissions are, no doubt, as Mr. Swann says, in the air just now, so to speak, and that a Commission of some kind or other would be the outcome of the cry, "Cut the combs of the Railroads," might indeed have been forecasted by a Railway *Zadkiel* without much fear of consequences to his prophetic reputation. The kind of Commission which has been incubated, however, is a very far-reaching one, involving very grave extensions of power in existing Judicial bodies, to wit, the Circuit Courts of the United States, and very serious and extraordinary grants of power to the Commission created by the Act. That a Special Commission, with temporary powers, for the purpose of investigating into the Railway problem, would have been a much safer Constitutional remedy, and more likely to give general satisfaction, we agree with Mr. Swann in believing. It is hard, indeed, to think otherwise, as we read the Act with the highly suggestive comments of Mr. Dos Passos (*The Inter-State Commerce Act*, Vol. 38, in

Questions of the Day. New York and London. G. P. Putnam's Sons. 1887), on the Constitutional difficulties involved, or with the practical comments of Mr. Swann. New and highly penal offences have been created by Statute—a practice not commendable *per se*, and requiring strong cause to be shewn for its justification—new Tribunals have been created, old Tribunals have had their sphere of action enlarged—and with what result? As yet, of course, no distinct answer can be given on the question of results. It is possible, as Mr. Swann admits, and as any dispassionate student of the problem at issue must admit, that at first certain apparently good results may flow from this hazardous piece of Legislation. But these good results, if any, might certainly have been obtained at the cost of far less risk to all concerned, and by much simpler means. It is a mistake, to say the least, to create new and untried Tribunals and invest them with singularly large powers, for all time, if a temporary extraordinary Tribunal would in all probability be adequate to the needs of the occasion. It is a mistake, to say the least, to raise grave doubts in men's minds concerning the Constitution under which they live, by Legislation which bears marks, not only of haste and vindictiveness, but also, on many points, almost certainly, of Unconstitutionality. We give the Act the benefit of the doubt, simply because we do not as yet know of a decided case on the raising of any of the numerous possible Constitutional questions which may at any moment arise thereunder. And, in the first resort, such points would not improbably be decided in favour of the Act by the Circuit Courts whose jurisdiction is enlarged under it. The Supreme Court will, in the last resort, have the final word to say on this very grave question, and we shall be greatly interested in seeing how far the able Jurists who adorn its Bench will shew themselves to be in harmony with the general views of Mr. Dos Passos and Mr. Swann.

Reviews.

The Exchequer Rolls of Scotland. Edited, under the direction of the Deputy Clerk Register, by GEORGE BURNETT, LL.D., Lyon King of Arms. Vol. XI., 1497-1501. H.M. General Register House, Edinburgh. 1888.

The arrival upon our table of the eleventh volume of this valuable series reminds us that it is some time since we have been able to give our readers an account of its progress, and we proceed to repair the omission as well as we may, *currente calamo.* The documents which have been entrusted to the editorial care of Lyon are like the majority, perhaps, of the Scottish Record publications, as contradistinguished from the English Rolls series, not technically Chronicles or Records, but Rolls or Registers. They are Accounts of Expenses, not Narratives of Events, but they are none the less valuable on that account, for the insight which they afford us into the Civilisation and the Home and Foreign relations of Scotland, during the important period which they cover. And the very fact that much of the information which they give us is purely *obiter*, or has to be extracted from the pages of the Rolls by the careful examination of the Editor, is in itself good warrant of its accuracy. Thus we see evidence of trade with England, and of the fact that Scotland was a market to which novelties might be and were introduced, in the entries relating to certain *bona Anglicana*, viz., *a pannus laneus* from England, called *le carsais*, introduced into the Kingdom within the tenure of office of the Custumars for Edinburgh, 1499-1500. We also see evidences of the mediæval wine trade with Spain, in the accounts *pro duobus doliis vini Hispanie*, which may have covered what we now call Port as well as what we now call Sherry. Rhine wine is sent to Stirling, and Claret is also named. We find gardens and orchards receiving attention, as well as the *Artayliaria Regis.* Well for the country when the care of gardens was uppermost, for the day was yet to come when the Flowers of the Forest were "a' wede awa'" on Flodden field. The keep of greyhounds forms a subject of entries indicative of the social life of the period. Unfortunately, the entries which tell how Rutherfurds and Turnbulls, Armstrongs and Elliots, and all the

irritabile genus of border clans could with difficulty be kept in some sort of subjection, are also and equally indicative of Scottish life in the last years of the Fifteenth Century. So, too, are the entries which quaintly tell how a powerful noble, an Earl of Douglas, we will say, became pledge for a Douglas, or other follower, and abducted the offender, so that the fine could not be recovered. It is impossible to carry out any researches into the mediæval family history of Scotland without noting case after case of the Chief, or some other powerful member of the race becoming pledge for one of the name, whom it was desirable to protect in order to keep up the family strength in time of need. Justice, as we understand it, no doubt often came off second best, in her encounter with Lawlessness, or at least with Might. Very often Justice was lenient enough to remit the fines due for reiving and sorning, or even for slaughtering the lieges, because no doubt Justice felt herself very weak in the matter of enforcing them. We believe this to be the explanation of the majority of the cases, to some of the most remarkable of which Lyon draws attention in his Preface. There are some curious entries relating to expenses incurred on behalf of the "Duke of York," to which Lyon also refers, accepting the prevailing view that he was really Perkin Warbeck of Tournay. That James IV. at one time believed in the adventurer's claim seems, to our own mind, strongly indicated by his gift of the White Rose of Scotland in marriage. At least, we can hardly imagine James going the length of giving a cousin away to a Perkin Warbeck, knowing him to be such. Whether disillusion came to the Royal mind subsequently, we know not, but the support in arms of the supposed Duke of York's claims on the English Crown was absolutely useless to him, and did nobody any good, while it may have indirectly led up to later disasters. We must confess that we are not so much impressed as Lyon by the fact that there must have been plenty of persons living who could have shewn the falsity of the admission of his fraud put into the mouth of the defeated claimant. Human nature, whether in the Fifteenth or the Nineteenth Century, is much the same on the point of not having a quarrel with Cæsar and his twenty legions. To say to a King, "You are putting forth a lie, knowing it to be such," was not a safe thing to do in those days, and we can conceive of the possibility of people in possession of rebutting evidence, if such existed, abstaining from bringing it forward.

There are some lights in the picture to which Lyon invites our attention. University life was in fashion; a Bishop of Lismore was studying at the University of Paris, famous for its Theology, and a Bishop of Aberdeen, the great William Elphinstone, was founding the University of Aberdeen, for which the King of Scots obtained the Papal privilege in 1494. Statesman, Church Reformer, and promoter of Learning, the Founder of the University of Aberdeen was a man of whom Fifteenth Century Scotland may well be proud.

The Law and Practice of Bankruptcy under the Bankruptcy Act, 1883, and the Rules and Forms, with Notes. By E. COOPER WILLIS, Esq., one of Her Majesty's Counsel, assisted by A. R. WHITEWAY, Esq., Barrister-at-Law. Stevens and Sons. 1884.

After an Act has settled down into operation it is a considerable test of the utility of a *Practice* to see how it stands the test of time. The excellent work now before us was one of those brought out shortly after the new Bankruptcy Act came into force. The learned author has had extensive experience in the subject with which his Treatise deals, and his name alone gives a guarantee for its value. Written, as it was, before the Act had been fairly tested, it cannot, of course, as Mr. Willis admits in his Preface, contain so comprehensive an account of its working as the next edition, no doubt, will, but its structure and arrangement are admirable. The heads of subjects in the notes are printed in Clarendon type, a very useful plan (and one often adopted in text-books nowadays), as it places them conspicuously before the reader. We specially draw attention to the concise and lucid treatment of section 44 (p. 190, *seqq.*), dealing with the description of the Bankrupt's property which is divisible amongst his creditors. The advantage of the use of Clarendon type is specially noticeable on pp. 198—203.

The Index, which is compiled by Mr. Whiteway, is comprehensive, and quite on a par as to merit with the body of the work. If there is one thing more essential than any other to the success of a legal Treatise it is a good Index, and we have frequently seen works, otherwise unexceptionable, spoilt by this want. Owing to the completeness of the Index, the Clarendon type, and the systematic method of dealing with the subject, the practitioner can find any particular points he wishes without labour or trouble, and these various merits can hardly fail to be appreciated by the Profession.

At intervals thoughout the book, Mr. Willis submits his own opinion on the Act and its construction, and these expressions add greatly to the value of the work. Thus on p. 117, treating of section 28, he says: "It is probable that an attempt will be made to read sub-section 2 by the light of decisions on section 159 of the Act of 1861. As the two sections are not the same, I submit that only a limited assistance can be obtained by such an attempt," quoting, in support of his own view, the opinion of the late Master of the Rolls in *E. p. Blaiberg, re Toomer*, 22 Ch. D. 258. Bankruptcy is pre-eminently a subject where the doctrine of the survival of the fittest is likely to apply to the shoals of Treatises produced. We think Mr. Cooper Willis shews cause for his being amongst the survivors.

The Duties of Solicitor to Client as to Partnership, Agreements, Leases, Settlements, and Wills. By EDWARD F. TURNER, Solicitor. Stevens and Sons. 1884.

This volume is an enlarged version of the author's course of lectures on the subject delivered at the Law Institution, thus forming a sister volume to his work on the *Duties of Solicitor to Client in connection with Sales, Purchases, and Mortgages of Land.* Its object and its *raison d'être*, as stated in the Preface, are the same which guided the author in publishing his former work, viz., that although there are plenty of Treatises written to enable students to pass the examinations necessary for becoming a Solicitor, there are comparatively few to assist him in mastering the higher duties of that branch of the Profession, as distinguished from its minute details. And this want peculiarly attaches to the Conveyancing work of Solicitors. The book is written in rather a novel style for a Law book; there are very few cases cited, and it is couched in the easy, conversational style of a lecture. In this respect it is good. Law books are generally too formal and dry; there are no friendly suggestions, and no familiar advice. Again, it is so difficult to get the bulk of students to read anything but what is absolutely requisite for the examinations; and the only way to induce them is to cast a work in an entertaining form. Law is rather a difficult subject to treat in such a fashion, and it is a great art in a Law book to conquer this real difficulty. In this respect we must congratulate Mr. Turner. The work is made as interesting as the nature of the subject admits, and it is also practical and accurate.

The chapter on Leases is the least complete, but then Leases constitute a large subject. The portions on Partnership are the best. We specially recommend for perusal the suggestions as to dealing with the assets and liabilities of the old firm on the admission of a new partner. Mr. Turner deservedly draws attention to the frequently unnecessary length of partnership articles, through provisions being inserted which are implied by law. Young practitioners will find the lecture on Settlements useful, especially the observations as to how far the Solicitor of either party ought to investigate the title of the other party with regard to Realty proposed to be brought into settlement. Mr. Turner's book shews itself to be the work of a man of considerable experience, and possessed of a thorough grasp of his subject.

Executors and Trustees: Their Duties and Responsibilities. By SHACKLETON HALLETT, of Lincoln's Inn, Barrister-at-Law. C. W. Deacon and Co. 1888.

We are glad to welcome Mr. Hallett's book. It introduces a new feature in Legal Treatises, its chief merit being that it does not shrink from exposing the numerous errors in our Legal system in a bold and straightforward manner. We may be permitted to regret, in the interests of the public, that there have been so few Legal works couched in this strain before. We thought, at first sight, that Mr. Hallett's work was written to supply a want much felt amongst students, viz., a short Treatise on Executors and Trustees, for examination purposes. There is, of course, Underhill's *Law of Trusts* written for that purpose, but no other small work, as far as we are aware, and Mr. Underhill does not touch on Executors or Administrators. On reading Mr. Hallett's preface, however, we saw that his Treatise was designed for the use of Trustees and Executors of small estates, with a view to saving them expense, and it is well adapted to carry out that purpose. We cannot but think that Mr. Hallett has committed an error in inserting some decidedly irrelevant matter, such as "The Reforms of Prince Gaudama Buddha," "How we Civilize the Indian Masses," &c., subjects which, though interesting in themselves, and as questions in Political Science and the Comparative study of Religion, can scarcely interest an English nineteenth century executor seeking to administer to an estate economically, and to save his own pocket. We must express our regret at the absence of

an Index and a list of cases; and we sincerely trust that Mr. Hallett will supply these omissions in his next edition, for which we hope that there will be an early demand. The scope and intent of the book are foreshadowed in the Introduction, which is clearly and strikingly written. Mr. Hallett says that our Law relating to Trusts and Wills and their administration is in an eminently unsatisfactory condition; he points out in the body of his work what are the principal blemishes of that Law, and draws attention to the ruinous bills of costs payable to Solicitors, who, he avers, "have edged their way in between subject and counsel," and he offers some practical suggestions to ensure security to the Trust Fund, and shews the source from which properly qualified Trustees may be drawn, the want of which he notes as being a great weakness in our present Trust system. Practical matter touching Wills is given at pp. 98—112, and at pp. 117—170, on the duties of Executors and Trustees, together with some valuable advice for them. The relative portions of the Conveyancing Act, 1881, and the Settled Land Act, 1882, are set out, and the book winds up with a few words on the Administration of the Law as it is, shewing (p. 224) how "the present system of legal administration presses very hardly upon trustees and executors." To intending litigants, Mr. Hallett's advice is, "Don't go to Law." On the whole, we gladly recommend this able work, which, we think, is likely to be productive of much good to the classes for whom it is intended. The public should be indebted to Mr. Hallett for the plain and unequivocal language in which he has hit some of the blots which still disfigure our Legal system.

Manual of the Education Acts for Scotland. By ALEXANDER CRAIG SELLAR, Advocate, M.P. Eighth Edition. By J. EDWARD GRAHAM, B.A., Oxon., Advocate. Edinburgh: Wm. Blackwood and Sons. 1888.

The publication of an eighth edition of Mr. Sellar's work ought of itself to be a recommendation of the book, provided that its revision and adaptation to the present times by another hand than that of the author should have been so carried out as to sustain the high reputation to which it had previously attained. Mr. Graham, we are glad to find, has in the present case added considerably to the value of a very useful work. Since the original Education Act for Scotland, 1872, other Statutes

have been passed, dealing with some requirements peculiar tc Scotland, enlarging or amending the principal Act, and providing for special matters, such as the dismissal of Teachers, &c. Some of these later Statutes have had the advantage of Mr. Sellar's observations in seven editions; but we have now the text of the Education (Scotland) Act of 1883, and others, with all necessary notes by his successor. In Part III. are comprised cases in the Court of Session, and in Inferior Courts, and opinions of Counsel brought down to date, and affording a large store of useful information.

Seeing that the agitation for improved Secondary Education is increasing, and that Professor Blackie's "bitter cry" for more preparation on the part of youths entering the Scotch Universities has reached a wide range of sympathetic hearers, it is important to have access to all legislation bearing upon that question. Accordingly, Mr. Graham has introduced the Educational Endowments (Scotland) Act, 1882, 45 & 46 Vic., c. 59. The chief interest of the Public will be in the Reports and Schemes issued by the Commissioners under that Statute, and the *Manual* does well to specify the Reports already issued, and to give also the names of a few "Special Cases" submitted to the Court of Session, with the Law publications where they are recorded. We must admit that we looked for the Education Code for Scotland, and for some leading communications from the "Department," but we do not find them in this edition, for the reason that "the instructions there given are frequently superseded or altered." That is undoubtedly the case. Mr. Graham, however, makes a suggestion with which we are not disposed to quarrel. He says that "the Code and other important regulations of the Department can always be purchased at a trifling cost, and all circular letters are published in the Report of the Committee of Council on Education in Scotland, presented annually to Parliament. A copy of that Blue Book should be in the possession of every School Board." The Appendix is well provided with Statutes bearing, however indirectly, on Scotch education, and it contains a circular from the Department as to Technical Schools, the late Act of 1887 relating to these being incorporated in the body of the work. It may be mentioned, in conclusion, that this part of the *Manual* also contains a convenient collection of Forms of Complaints, &c., for Prosecutions under the Education Acts.

THE
LAW MAGAZINE AND REVIEW.

No. CCLXXI.—February, 1889.

I.—SOME RECENT INCIDENTS IN INTERNATIONAL LAW.

"INCIDENTS" bear the same relation to International Law that Judicial decisions do to Civil or Municipal Law. They are the groundwork on which most of the principles and rules regulating the relations between States, have been and are still being built up. Occasionally such rules are enunciated in a shape which possesses to a great extent the clearness and formality of direct legislation, as in the case of Treaties, Decrees, Statutes, and Declarations like that of Paris in 1856; but even these are generally the outcome of some specific events which have complicated the harmonious relations existing between nations.

The History of the last few years has been remarkably prolific in "Incidents" of this kind, several of which are of very considerable importance to those interested in the study of International Law. America, as usual, has contributed a large proportion of them, but there are many others of great interest which have arisen in connection with other States.

The more prominent cases include the North American Fisheries Dispute; the French Reprisals against China and Blockade of Formosa in 1884; the Blockade of Greece in 1886; and the Sackville Incident, which has recently created so much sensation. In addition to these are various minor questions which have arisen as to the acquisition of new Territory, the position of *de facto* Governments,

the privileges attaching to Ambassadors, and other matters of a similar nature.

It would be impossible in the present Paper to treat all of these as exhaustively as their importance would merit, but a careful examination of at least some of them will be both practicable and useful. The Canadian Fisheries question is, undoubtedly, the most important of the points just enumerated, but it has been so recently and fully dealt with in this *Review** as to render any further discussion, for the present, a work of supererogation.

In considering the other points it would be futile to aim at following any particular order, chronological or otherwise. It would, perhaps, therefore be advisable to deal first of all with those which require the most careful and detailed treatment, namely, the Sackville Incident and the question of Pacific Blockade, and then proceed to the consideration of the remainder.

I. The summary dismissal by the U.S. Government of Lord Sackville, the British Minister at Washington, is still fresh in the minds of all. The public interest evoked by the proceeding has not even yet worn off, and as a most important principle of International Law is involved, it will be well worth while to examine the subject at some length.

There is confessedly, however, some reason for doubting, *in limine*, whether the incident is really a fit subject for legal discussion, on the ground that from first to last it was nothing more than a phase of the Presidential Election. From this point of view, there certainly is a shade of absurdity enveloping it, almost sufficient to banish any idea of serious criticism.

That this view accurately reflects the motives which prompted President Cleveland to take the step he did,

* *Law Magazine and Review*, No. CCLXVIII, for May, 1888. Art.: *The British North American Fisheries.* By Alex. Robertson, M.A.

there can be no doubt in the minds of impartial observers. Much has been said both in jest and in earnest as to the methods adopted by the rival political parties in the United States in their struggle for place and power, and although such criticism may sometimes verge on burlesque, the fact remains that, on such occasions, courtesy and good sense are too often subordinated to the exigencies of party strife. Even so unbiassed an authority as Professor Bryce, in his recent exhaustive work on America,* cannot help commenting upon this national failing in most deprecatory terms. Take, for instance, this one passage, amongst many others, in the chapter on Issues in Presidential Elections :—"The excitement in one of these contests runs so high that the canons of decorum which American custom at other times observes are cast aside. The air is thick with charges, defences and recriminations, till the voter knows not what to believe."†

So in the present case the Election fervour was at its highest pitch. The Democratic wire-pullers had, for some time past, been assuring the President that Lord Sackville's letter had already caused‡ a marked defection of voters,—especially those of Irish origin, to the other side, and were urging upon him the necessity of some "heroic treatment" of the incident. The recent course of the Election campaign had justified apprehensions of the discredit and defeat of the Adminstration. The President, therefore, gladly seized the opportunity afforded by the British Minister's indiscretion to use the latter as a trump card in his contest for the Presidential Chair. No one was better aware than he of the value of such a

* *The American Commonwealth.* By JAMES BRYCE, D.C.L. London, 1888.

† *Op. cit.*, Vol. II., p. 589.

‡ Mr. Phelps practically acknowledged this. State Paper, C. 5,616, p. 7: "Further Correspondence."

card. Nothing could arouse the indignant enthusiasm of the average American citizen so much as a spirited rebuff administered to the representative of a foreign government, who had dared to attempt to influence what Mr. Bryce calls "the Working of the Machine." The rebuke was, indeed, brusque in its severity, but the history of political campaigning in the United States is replete with still more extravagant illustrations of the maxim that "all is fair in War."

It would be an injustice, and perhaps an insult to Mr. Cleveland, to suggest that at any other time, and under less agitating circumstances, he would have acted as strongly as he did, even admitting, for purposes of argument, that Lord Sackville was technically at fault. Incidents of this kind, however, form precedents for the future, and it would therefore be well to consider here the nature of the offence, and the legitimacy of the punishment accorded. Election manœuvres may not themselves fall within the scope of a Paper such as this, but when they cause the agents who use them to so far "forget the canons of decorum" as to violate well recognised principles of International Law, they amply merit discussion. It is, therefore, this question whether the present case did, in fact, constitute such a violation, which concerns us.

The position of Diplomatic representatives at foreign Courts has always been of an extremely delicate nature. It is girt about with forms and ceremonies, and protected by innumerable privileges. The idea of the sanctity of such persons arose, in the first place, from their being regarded as direct mouthpieces of their own Sovereign, and as bearing about with them many of the semi-sacred attributes characteristic of the Royalty whose servants they were. The legal fiction of Exterritoriality, moreover, although of comparatively modern growth, added force to this idea.

The rules governing the *Jus Legationis* are, of course, not more clearly formulated than most other rules acted upon by nations in their dealings with each other, but all writers and authorities, from Grotius downwards, are in more or less harmony as to what right a State has to dismiss summarily a Public Minister accredited to it. The *consensus* of opinion restricts such a right to cases where offences have been committed by Public Ministers affecting the existence or safety of the State, or when their continued stay in the country might in any way seriously endanger the State. In very extreme cases, of which happily there are but few recorded instances; some writers think that the imperilled Government might even be justified in seizing the Minister's person and papers.

In all less urgent cases, however, the established usage of nations has always been to address a note to the Government of the offender, intimating that the continued presence of the latter in his official capacity would be unacceptable, and requesting that he may be recalled.

The more familiar instances of expulsion or demand for recall are cited in most of the text books, and need not be recapitulated here at any length. In nearly every recorded case of summary expulsion, the offence complained of amounted to actual conspiracy against the Sovereign or the English Government. There are the two cases of the Bishop of Ross and De Mendoza in Elizabeth's reign; one under the Protectorate, and the flagrant instance in the time of George I., in which Gyllenborg, the Spanish Ambassador, was the offender. The arbitrary action taken against Sir Henry Bulwer, the British Minister to Spain, in 1848, was the most recent instance, and here, too, the reason assigned for the expulsion was alleged assistance rendered by the British Representative to insurgents against the Government to which he was accredited.

In America, at the end of the last century, Genet, the French Minister, was proved to have been guilty of very reprehensible conduct towards the Government of the United States, yet Washington did not venture to expel him, but merely requested his recall.

There are several other instances in the earlier years of the present century of demand by the United States for the recall of ambassadors to which it will be necessary to refer later on. It may be well to state here that, down to the time of the Sackville incident, there have been few or no recorded instances of *summary expulsion* of a foreign Minister by the American Government, although in many of the authenticated cases of demand for *recall*, the offence complained of was of a far more flagrant nature than in the case of Lord Sackville.

No stronger impeachment of President Cleveland's action could be given than that afforded by the voluminous collection of American precedents and opinions compiled by Dr. Wharton in his recently-published *Digest of American International Law*,* to which it will be convenient to refer in the course of the present Paper as to a source of acknowledged authority. It may further be mentioned here that the circumstances attending the dismissal of Lord Sackville are fully disclosed in the correspondence between the two Governments, and between Lord Sackville and Lord Salisbury, published in the form of two Parliamentary papers.†

Whether the acts of Lord Sackville were really capable of the unfavourable interpretation imputed to them, or afforded in any way sufficient ground for the step taken by President Cleveland is fairly arguable, and the question will be dealt with shortly; but the

* *A Digest of the International Law of the United States.* By FRANCIS WHARTON, LL.D. Washington. D.C. 1886.

† C. 5,558 (1888); and C. 5,616 (1889).

remarkable point in the whole affair lies in the fact that before the end of the third day after the demand for recall had first been made, the Government of the United States had peremptorily dismissed Lord Sackville, and returned him his passports. Whatever may be said on the main question, this step was, under the circumstances, entirely indefensible.

If the offence complained of was from the point of view of the American Government a good ground for such a dismissal, the latter was the only step necessary to be taken, and the demand for recall was superfluous. If, on the other hand, it was not sufficiently serious to necessitate such summary action, then, in pursuance of a long line of precedents, the demand for recall should have been accompanied, or at least followed, by the delivery of full particulars of the alleged misconduct, and reasonable time should have been allowed for complete discussion of the matter. Dr. Wharton, in the first volume of his *Digest*,* quotes an opinion of Mr. Buchanan, Secretary of State, in 1847, to the following effect:—"While the right of a sovereign to require the recall of an offensive minister sent to him is generally recognized, a qualification is recognized in cases where the request is based on a charge of an offense alleged to have been committed by such minister of which offense the Government commissioning him holds him to be innocent. In such case no recall based on this assumption of the offense will be granted."

It might at least be expected that the American Government would accord reciprocity of treatment in the matters in question, yet in the Sackville case not only did the dismissal follow so closely upon the demand for recall as to exclude any possibility of mature consideration of the

* Vol. I. p. 610.

validity of the demand, but the complaining Government did not even supply the barest particulars of the alleged offence* before taking the extreme step which rendered any recall unnecessary. Party exigencies, in short, overruled International Comity. On the 27th October the first intimation of Lord Sackville's offence was made by Mr. Phelps to Lord Salisbury. The same evening Lord Sackville received from the Foreign Office a telegram requesting an explanation of his conduct. In this latter Lord Salisbury said: "To recall you on a formal request from the Government of the United States made under circumstances of considerable publicity was a course which implied the censure of two Governments: therefore, before acceding to any such request, Her Majesty's Government were bound in justice to you, to satisfy themselves of the objectionable character of the language you had uttered." †

The British Minister telegraphed back on the following day, regretting the occurrence, and intimating that he had sent a full explanation by the preceding mail.

On the 31st October, before any further proceedings could by any possibility have taken place, Lord Sackville was officially informed by Mr. Secretary Bayard "that the President, for causes good and sufficient, which were known to Lord Sackville and had been brought to the cognizance of Her Majesty's Government, had become convinced that the official position which the latter then held in the United States was not compatible with the best interests, and was detrimental to the good relations between the two Governments, and that he had therefore sent his Lordship his passports."

* All of these were not received by the British Government until December 4th; Cf. State Paper, C. 5,616: "Further Correspondence."

† This and the extracts immediately following are quoted from the State Paper, C. 5,558, U.S. No. 3 (1888).

In view of this unvarnished statement of facts, it is somewhat amusing to read the words used by Mr. Secretary Bayard in an interview with a newspaper reporter on the 31st October, in which he says : "The President waited what he considered a sufficient length of time before he resolved on definite action, and finding that the British Government were apparently doing nothing in the matter, he decided, in view of the emergency, to do what has been done to-day." (*Times*, 1st November, 1888.)

This abrupt and unceremonious proceeding at once altered the complexion of affairs. Lord Salisbury had, of course, no alternative but to accept the dismissal as a *fait accompli*, and the subsequent correspondence was solely to elucidate the reasons for President Cleveland's unexpected action.

There is no ascertainable precedent for the latter, considering all the circumstances. In every case in which a demand for recall has been made, reasonable, and usually ample, time has been allowed for the delivery of full details and due deliberation by the offender's Government.

In the case of Yrujo,* the Spanish Minister to the United States, who had made himself obnoxious to the Government of that country in 1804, negotiations went on for quite three years from the time when the demand for recall had first been made, until it was acceded to in 1807. This was perhaps an extreme instance, but Genet's case,† in the time of Washington, exhibited the same feature in a lesser degree.

In 1809, again, Mr. Jackson, the British Minister at Washington, was accused by the American Government of long continued conduct of a most objectionable nature, yet no attempt was made to summarily dismiss him, although he was not actually recalled till 1810.‡ In addition to these American cases many others might be cited, shewing

* Wharton, *Digest*, I., p. 605. † *Ibid.*, pp. 604-605. ‡ *Ibid.*, p. 606.

uniformity of practice on the part of the Governments of Great Britain and other European States.

The extraordinary doctrine asserted by the American Government as a ground for not furnishing particulars and allowing time for consideration, that "the acceptance or "retention of a minister was a question solely to be deter- "mined *either with or without the assignment of reasons* by the "Government to which he was accredited," was entirely and justly repudiated by Her Majesty's Government.* In his final communication on the subject, Lord Salisbury replied on general principles: "Her Majesty's Government are unable to assent to the view of international usage which you have expressed. It is of course open to any Government, *on its own responsibility*, suddenly to terminate its diplomatic relations with any other State, or with any particular minister of any other State. But it has no claim to demand that the other State shall make itself the instrument of that proceeding, or concur in it, unless that State is satisfied by reasons duly produced, of the justice of the grounds on which the demand is made."

The principle adopted by Lord Palmerston in the case of Sir Henry Bulwer in 1848 affords an exact authority for this view of the case.†

The American contention was no doubt based on the line of argument adopted by Mr. Fish, Secretary of State in 1871, in the case of the demand for the recall of Mr. Catacazy, the Russian Minister.‡

In this case almost identical principles were asserted, but were refused recognition by the Russian Government. Summary dismissal was threatened if the demand for recall

* C. 5,616, p. 7. Mr. Phelps to Lord Salisbury, and reply, State Paper, C. 5,616, p. 13.

† See letter of Lord Palmerston to Señor Isturiz, 12th June, 1848, quoted in Lord Salisbury's letter, *Ibid.*, p. 14.

‡ Wharton, *Digest*, I., p. 611.

was not at once and unconditionally acceded to. It was, however, ultimately decided to "tolerate the minister" for a time, on the ground of the alleged impossibility of immediately replacing him. This incident is quite unique, and introduced an altogether novel doctrine, and the fact that the Government to which the latter was submitted disputed its validity, renders the case of little or no value as a precedent.

Considering, therefore, the action of President Cleveland from this point of view alone, it appears to have been utterly indefensible and inconsistent with the recognised principles of International Law.

It is necessary to consider, in the next place, the question whether the conduct of Lord Sackville was such as to warrant the summary rebuke administered. There is no need to enquire if it was such as to justify the demand for recall, since the President altogether superseded the latter by his subsequent action, and rendered any response to it superfluous. Perhaps, technically speaking, a good case for such a demand might have been made out.

Lord Sackville had clearly been guilty of an indiscretion in his criticism of the Cleveland Administration, which would possibly have sufficed to prevent his continuing to be regarded as a *persona grata* by the latter. The only question in point, however, is this:—Did the alleged offence justify the unceremonious dismissal of our Minister and the return of his passports? To this, a careful perusal of authorities, always bearing in mind the true facts of the present case, can only afford one answer, and that in the negative.

What, then, was the exact nature of Lord Sackville's alleged offence? According to the published correspondence, it was twofold, although, at first, Mr. Phelps was misunderstood by Lord Salisbury to limit it to a single

ground. It was alleged to consist, *firstly*, of a letter commenting on the policy of the Cleveland Administration with respect to the Fisheries Treaty; and, *secondly*, of certain statements in the same strain made by Lord Sackville in the course of subsequent newspaper interviews.

The former was a reply to what purported to be a private and confidential letter from a "Mr. C. F. Murchison," residing at Los Angeles, in California, who stated that he was a naturalised American, but of British birth, and still "considering England his motherland," and that he desired advice as to how he should vote at the ensuing Presidential Election.

The request ran as follows:—"As you are the fountain-head of knowledge on this question, and know whether Mr. Cleveland's present policy is temporary only, and whether he will, as soon as he secures another term of four years in the Presidency, suspend it for one of friendship and Free Trade, I apply to you privately and confidentially for information, which shall, in its turn, be treated as secret and private."

Lord Sackville, who did not learn till too late that the communication was "fictitious, and concocted by a well-known firm in New York," replied a few days later in a letter, of which the material part was as follows:—"You are probably aware that any political party which openly favoured the Mother Country would, at the present moment, lose popularity, and that the party in power is fully aware of the fact. That party is, I believe, still desirous of maintaining friendly relations with Great Britain. . . . It is, however, plainly impossible to predict the course which Mr. Cleveland may pursue in the matter."*

An extract from the *New York Times* in favour of the Government policy was also enclosed.

* State Paper, C. 5,558.

The alleged statements made in the newspaper interviews are set forth in extracts from the *New York Herald*, *New York Times*, and *New York Daily Tribune*, enclosed in a communication from Mr. Phelps to Lord Salisbury on December 4th.* An exact appreciation of the nature of these is very important, as the United States Government avowedly relied upon them as the chief ground of offence; and, in any case, there seems to be little doubt that the letter to Murchison could not in itself have been regarded as a serious offence of a public character. Private communications made by an Ambassador in good faith have never before been made the subject of International complaints.†

The newspaper extracts referred to certainly do not appear to contain what Mr. Phelps alleged to be‡ "an imputation of discreditable motives not only to the President, but to the Senate of the United States, distinctly made by Lord Sackville." The offensiveness, if any, is caused largely by the extravagant form which they have assumed at the hands of the enterprising editors. As Lord Salisbury, however, afterwards pointed out, their true purport was a fair matter for examination and discussion, if any such discussion had been desired and allowed by the United States Government.

Wharton, in his *Digest*, quotes several opinions and cases which bear more or less on this subject, in dealing generally with the validity of President Cleveland's action. Mr. Forsyth, Secretary of State, said, in 1837:— "The publication by a foreign Minister, during his official term, of a document charging the United States with bad faith, will be ground to demand his recall." §

John Quincy Adams is reported to have said, "It is an impropriety for foreign ministers to publish criticisms on the

* State Paper, C. 5,616.

† *Ibid.*, p. 14. Lord Salisbury to Mr. Phelps.

‡ *Ibid* p. 6.

§ Wharton, *Digest*, I., p. 610.

Government to which they are accredited;"* and in 1795, *àpropos* of the Genet incident, Mr. Randolph, the Secretary of State, in a letter to M. Fauchet, said "It will ever be denied as a right of a foreign minister, that he should endeavor, by an address to the people, oral or written, to forestall a depending measure, or to defeat one which has been decided."†

There might be some ground for doubt as to the applicability of these *dicta* to the present case, but the following opinion of Mr. Secretary Buchanan, in 1848, is very much in point:—"The plain duty," he said, "of the diplomatic "agents of the United States is scrupulously to abstain "from interfering in the domestic politics of the countries "where they reside. This duty is specially incumbent on "those who are accredited to Governments mutable in form, "and in the persons by whom they are administered. By "taking any open part in the domestic affairs of such a "foreign country, they must, sooner or later, render them-"selves obnoxious."‡

The Printed Personal Instructions issued to Diplomatic agents of the United States, in 1885, further reiterate emphatically this opinion:—"It is forbidden to diplomatic "agents abroad to participate in any manner in the political "concerns of the country of their residence," and they are especially enjoined to "refrain from public expression of "opinions upon local, political, or other questions arising "within their jurisdiction."

These seem to be very reasonable statements of what is, after all, merely a truism. It is obviously inconsistent with the position of an Ambassador to do anything which may render his presence unacceptable to the State to which he is accredited. He must, from the very nature of his office, be a *persona grata* at the foreign Court, and it is undoubtedly

* Wharton, *Digest*, I., p. 586 [citing *J. Q. Adams Memoirs*, 410.]

† Wharton, *Digest*, I., p. 586. ‡ Wharton, *Digest*, I., 698.

open to the latter to request the recall of a Minister who ceases to possess this qualification, and such action would in fact be advisable for all parties.*

All these authorities only prove that if the action of President Cleveland had merely consisted of a formal and dignified intimation to our Government that Lord Sackville had rendered his position untenable, on the above grounds, and a request that a new Minister might be accredited in his place, no demurrer could have been raised on general principles.

At the instigation, however, of Mr. Secretary Bayard or of some other person, an element of what a New York paper very aptly termed "bluster" was imported into the incident, and the President was driven into an act which, at the very least, involved a want of courtesy almost unprecedented in Diplomatic annals, and which, it is submitted, was indefensible, both morally and on grounds of International Law.

There are, indeed, several precedents in American Diplomatic History itself, which bear out this conclusion. The cases most nearly resembling the present are the two which arose in the first decade of this century, and which have been already referred to for other purposes.

In the earlier of these, the alleged offender was Yrujo, the Spanish Minister at Washington.† He was charged with having, in 1804, attempted to purchase the insertion in a Philadelphia newspaper of an article defending the existing policy of Spain, and criticising the attitude of the President and Administration. A note was sent to the Spanish Government requesting his recall, but the demand was not at first acceded to, and, as has been already mentioned, the interchange of communications on the subject continued until his recall in 1807. Pending the negotia-

* Wharton, *Digest*, I., p. 699. † Wharton, *Digest*, I., 605.

tions, he seems to have been guilty of exceedingly discourteous and even offensive conduct towards the Government and towards its members personally.

The other and later case,* that of Mr. Jackson, the British representative, occurred in 1809. A demand for his recall was made to the British Government in that year, the request being based on alleged offensive conduct, which rendered his continuance in his official position incompatible with the best interests of the two Governments concerned. The offence was stated to consist of charges of falsehood and duplicity against the Administration contained in a note which he had written to the Secretary of State. Although the position of affairs was so serious as to compel him to retire with his suite from Washington to New York, the negotiations were allowed to go on till the following year, when he was recalled by his Government, but without any mark of disfavour.

In this case, as well as in the former, complaints were made that, subsequent to the first demand for recall, the Minister had continued his obnoxious conduct, reference being made especially to comments upon the United States Government of a depreciatory nature made by him in "proposing toasts at public dinners at Boston."

In spite of the gravity of the circumstances attending both of these cases, it is to be observed that no extreme measure was resorted to, as in the comparatively trivial case of Lord Sackville.†

* Wharton, *Digest*, I., 607.

† [Since this article was in type, we have seen an interesting Paper in the *Forum* (N.Y.), for January, 1889, by President James B. Angell, on the Recall of Ministers, in which it is argued that "the exigency which made any action necessary was of an unprecedented nature, and called for speedy action, if any. Lord Salisbury seems to have failed to appreciate that fact. The President was therefore compelled to take a decisive step promptly. The parallel between the action in this case and that in the case of Francis J. Jackson must strike

There is another very interesting incident referred to by Wharton, which is in some respects analogous to the one under discussion.* It occurred in 1811, when President Madison communicated to Congress an intercepted letter sent by Luis de Onis, the Spanish Minister, to the Captain-General of the Province of Caraccas. In it the writer passed very severe strictures on the policy of the existing Administration, but, unfortunately, neither from a reference to Wharton nor to the American State Papers does it appear whether the incident resulted in the recall or dismissal of the Minister, though it seems probable that neither event took place.

A full consideration of the above facts tends thus to confirm the conclusion previously submitted that the act of President Cleveland was a distinct infringement of the rules of International Law.

The conduct of Lord Sackville was an undoubted indiscretion, and a breach of those necessary rules of etiquette which are morally binding on a Diplomatic agent. The offence complained of bears a strong analogy to the violation by a Peer of the Realm of our own Constitutional Rule which restrains Peers from interfering in the election of members of the House of Commons. In neither case is there any legal obligation in the strict sense of the term, but there is nevertheless in each a moral rule which it would not be expedient or proper to transgress.

Only one point remains to be noticed, and that is the course taken by Her Majesty's Government in reply to the action of the President. Many foolish suggestions were

the readers of this historical sketch." We have read President Angell's sketch with interest, but are not struck by the parallel. We agree rather with Mr. Parton, in the same number of the *Forum*, that a "needless severity" was exercised towards the British Minister, for an "amiable and harmless inadvertence."—Ed.]

* Wharton, *Digest*, I., p. 698, and 3 American State Papers (For. Rel.) 404.

mooted by irresponsible persons during the height of the excitement caused by the incident;—the suggestions offered ranging from retaliation, in the shape of the immediate expulsion of Mr. Phelps, to vague threats of a more bellicose nature. On the whole, our Foreign Office seems to have adopted the wisest course, and the one most in harmony with precedents.

To suspend Diplomatic relations altogether, as was done in the case of Sir Henry Bulwer in 1848, would have been a far too serious retort to an affront which, in some of its aspects, was almost farcical. The plan followed of leaving Lord Sackville's place vacant for a time, and confiding the duties of the Mission to one of the junior members of the staff was by far the more dignified. It was the course adopted by Lord Wellesley in 1810 in the Jackson case—the Ambassador's place being temporarily taken by a Chargé d'Affaires. In this latter case, moreover, Lord Wellesley emphasised the indignation felt by Her Majesty's Government by stating to the President that "Her Majesty has not marked with any expression of displeasure the conduct of Mr. Jackson, whose integrity, zeal, and ability have long been distinguished in H.M. service, and who does not appear on the present occasion to have committed any intentional offence against the Government of the United States."*

Lord Salisbury, in the present case, expressed the views of the British Government in a still more dignified and equally emphatic manner. He said: "It is sufficient under the circumstances to say that there was nothing in Lord Sackville's conduct to justify so striking a departure from the circumspect and deliberate procedure by which, in such cases, it is the usage of friendly States to mark their consideration for each other. I will abstain from comment upon the considerations, not of an international character,

* Wharton, *Digest*, I., 609.

to which you refer as having dictated the action of the President."*

Finally, a hope may be expressed that the incident may now be regarded as closed, and that the harmony so long existing between the two countries will soon be completely restored.

II. Within the last few years the discussion of the vexed question as to the legitimacy of a *Blockade in time of Peace*, has been stimulated by at least two very noteworthy incidents, viz., the closing of the ports of Formosa by the French in 1884, and the remarkable naval demonstration against Greece by the allied squadrons in 1886.

The subject has been so variously treated, and so hotly discussed by different authorities and writers during this century, that it would perhaps be merely adding fresh fuel to the fire to do more than state the bare facts in the present Paper. The very anomalous character, however, of the cases referred to, and the fact that the question has lately been elaborately examined in all its aspects by the Institut de Droit International, affords sufficient ground for once more reviewing it in the light of the most recent criticism.

The "Pacific Blockade," in its modern shape at all events, is entirely a creation of this century, and was introduced as a mode of International coercion in 1827, when the allied fleets of Great Britain, France and Russia blockaded the ports of Greece previous to the Battle of Navarino.

Altogether, there have been about a dozen instances of its employment in some form or other down to the present time, the best known being those which occurred in the years 1827, 1831, 1833, 1838, 1850, 1862, 1879, 1884, and 1886.

State Paper, C. 5,616. Marquis of Salisbury to Mr. Phelps, 24th Dec., 1888.

From the first, the innovating and anomalous character of the institution was recognised by everyone, even by the parties themselves who utilised it. Writers have always found a difficulty in assigning to it its proper place in the sphere of International Law. It is true that the principle of Blockade *in time of war* was clearly established, and rules for its application had been repeatedly enunciated by various Powers and by Prize Courts during the great wars of both the last and the present century. The Declaration of Paris in 1856 finally established almost complete unanimity amongst civilised nations as to the essentials and effects of such a Blockade. The new institution, however, was of a totally different nature. M. Guizot,* in 1841, said: "Nous nous sommes trouvés là dans une situation très difficile, nous faisions un blocus, ce qui n'est pas la guerre complète, la guerre déclarée;" and Lord Palmerston, in 1846, stated the objection in even weightier terms with reference to the Blockade of La Plata by France and England, when he said:—"The real truth is, though we had better keep the fact to ourselves, that the French and English blockade has from first to last been illegal . . . . . blockade is a belligerent right, and unless you are at war with a State, you have no right to prevent ships of other States from communication with the ports of that State."†

The key to the whole question has always been the fact that a Blockade, in the ordinary sense of the term, necessarily affects neutrals in almost as detrimental a manner as it does the blockaded State. In time of war, it is true, neutrals submit to certain inconveniences (sometimes, as in the case of the *droit d'angarie*, of an extremely aggravating

* Speech of Feb. 8, 1841, cited by Fauchille, *Blocus Maritime*, p. 48. Paris, 1882.

† Hansard, *Parl. Deb.*, Vol. XLVI., p. 939, and see Phillimore, *Int. Law*, Vol. III., p. 808.

character), in order not to embarrass the belligerents. These reasons, however, do not hold good in time of peace, when any attempt to exercise such belligerent rights would obviously create most serious difficulties, even if they did not afford a *casus belli*.

It is thus obvious that in instituting a so-called Pacific Blockade a State reaps all the advantages with respect to neutrals which a condition of belligerency would confer without being reciprocally fettered by any of the restrictions which openly proclaimed hostilities would impose. In the Formosan Blockade, for instance, the French ships were at first in the habit of coaling at British ports in the East, but after notification by the British Government of its intention to regard the state of affairs as one of war they were deprived of this advantage. This difficulty has characterised all blockades of the kind in question, from 1827 downwards, and was rendered very apparent in the Formosan incident in 1884.

The last mentioned case is peculiarly fraught with interest. It is, perhaps, the most extreme example of the so-called Pacific Blockade on record. Desultory hostilities against China had been carried on by the French fleet during the whole of the summer of 1884, although no declaration of war or profession of actual belligerency had been made by the French Government. It is true that a Note in the shape of an *ultimatum* had been sent to the Tsung-li-yamen in July, demanding the withdrawal of the Imperial troops from Tonquin, and the payment of an indemnity for the damage inflicted on French interests by their recent action there, but this was asserted to be merely a formal statement of grievances. On October 20th, Admiral Courbet, the commanding officer, proclaimed the blockade of all ports and roads of the island of Formosa, comprised between the south of Cape Nau Shan and the Bay of Soo-Au.

Our Government demurred to this step, in the first place, on the ground that the Blockade was not effective, as not being maintained by a sufficient force,—an objection amply borne out by the great length of the line of Blockade, and the comparative weakness of the French fleet.

Consequent on the proclamation, a singular state of things ensued, highly detrimental to the interests of all parties, and more especially disastrous to British Commerce. Foreign trade was exceedingly hampered, and, in fact, almost completely stopped within the prohibited area, while the regular Junk traffic continued to go on very much as usual. Such an anomalous state of things could not be tolerated without some protest; accordingly the British Government intimated to France that the "blockade must be taken by neutral Powers as a notification of a state of war." The French Government continued, however, to regard their own action as being merely in the light of reprisals, although it was obvious that the British protest was amply justified. Apart from the blockade itself, the naval proceedings on the part of Admiral Courbet had long been of the most serious and belligerent character. Keelung had been bombarded and taken a few weeks previously, and the Mingan forts had been attacked and dismantled. All these facts shew the extreme way in which the supposed principle of Pacific Blockade had been strained in order to bring the case in question within its scope. The cessation of hostilities, shortly afterwards, obviated the necessity of any further protests on the part of Neutral Powers, and the question of the legitimacy of the French claims from the point of view of International Law must be decided on the facts mentioned.

The Formosan incident, however, is singularly instructive, if compared and contrasted with the blockade of the Grecian ports two years later, when the institution was exhibited in a totally new phase. The two cases are in fact

useful examples of what may be termed, for want of better expressions, the two kinds of Pacific Blockade, (*a*) on ground of Reprisals, and (*b*) by way of Intervention.

The events which gave rise to the Greek Blockade are well known. The agitation of 1885 for the fusion of Bulgaria and Eastern Roumelia into a Greater Bulgaria, was the real cause of the sanguinary Servo-Bulgarian war, and culminated, early in 1886, in a general feeling of dissatisfaction among the Principalities of the Balkan Peninsula. The whole Eastern question seemed about to be re-opened in its acutest form, and all the minor States were mobilising their forces with a view to sharing in the anticipated spoils. Things had reached such a pass in Greece, that frontier conflicts between the troops of that country and the Porte had actually taken place, and on January 7th, the Russian Government proposed to the Powers that Greece, Bulgaria and Servia should be at once called upon to disarm, the Porte undertaking to demobilise her own forces immediately after such disarmament.

This was effected by a Collective Note of the Powers, which was disregarded, and the British Government thereupon proposed a peremptory Note of the same nature, backed up by a demonstration of the allied squadrons off the Piraeus. On the Greek Government neglecting to comply with the terms of this Note, or to give a satisfactory reply, orders were given to the commanders of the united squadrons, directing them "to establish a blockade of "the coasts of Greece against all ships under the Greek flag." Notification of the blockade was made in the following terms:—"The blockade will become effective from the date "of the present declaration, and will extend from Cape Malea "to Cape Colonna, and from thence to the northern frontier "of Greece, including the isle of Euboea, and will also comprise on the west coast the entrance to the Gulf of Corinth. "Every ship under the Greek flag which may attempt

"to violate the blockade will render itself liable to be "*detained.*" *

The novel features of this Blockade are more clearly displayed in the instructions sent to the commanding officers of the fleets. Our own Foreign Office wrote as follows:—"Should any part of the cargo on board of such "ship belong to any subject or citizen of any foreign power "other than Greece, and other than the powers above-"mentioned, and should the same have been shipped before "Notification of Blockade, or after such notification, but "under a charter made before the Notification, such ship or "vessel shall not be detained."

The instructions given in view of the determination of the blockade are particularly worthy of remark:—"Whenever "the blockade is raised you will receive instructions to "*release the vessels which you have detained. . . . . "Her Majesty's Government do not admit any liability "whatever to compensation to the owners of such vessels "on the ground of damage suffered during such detention.*"

The unique nature of these proceedings, as compared with all previous cases on record, and particularly with the Formosan case, is obvious from a perusal of these instructions. The chief points observable are:—(1) The preservation of Neutrals, or third parties, from suffering any prejudice by reason of the Blockade; and (2) The fact that the punishment for attempted violation by the Greek ships consisted merely in their "*detention*" during the continuance of the blockade.

There is no precedent for the course adopted, unless we regard as such the naval demonstration by the allied fleets before Dulcigno in 1880; which, had it proved ineffectual, would, undoubtedly, have been followed, as threatened, by

* For correspondence, &c., on the Greek Blockade, see State Papers for 1886, Nos. 4,731, 4,732, and 4,765, 4,766.

a blockade of that port similar in many respects to the one in question.

The fact is that if the Formosan blockade was a violent straining of the alleged principles of Pacific Blockade, the Greek operations did not constitute a pacific blockade at all in the existing sense of the term; although it was specifically alluded to in Parliament by Mr. Bryce, the then Under Secretary for Foreign Affairs, as a *Pacific Blockade*, it was, at most, only a partial one. At the same time, for the ends which the Great Powers had in view, it was perfecly effectual.

In the year 1886 the Institute of International Law, at the session held at Heidelberg, discussed the doctrine of Pacific Blockade in all its bearings, and more especially in view of the two recent instances which have been cited.* The question had previously (in 1875) been before the Institute, which had then decided, by a majority of its members, that the institution was not a legitimate form of constraint according to the rules of International Law.

On the more recent occasion, M. Perels, an eminent member of the Society, advanced for the acceptance of the Institute certain clearly formulated propositions, asserting the legitimacy of Blockade in time of peace, even as against neutrals, but deprecating the confiscation of vessels attempting a violation and upholding the "detention" system, which had been in operation in the Greek case.

It seems probable that M. Perels availed himself of the opportunity of generalising from the last-mentioned precedent, in order to meet the objection raised by Mr. Westlake and others in the discussion of 1875, that there could be no legal confiscation of vessels in time of Peace, as no competent Prize Court could sit except in time of War.

* *Annuaire de l'Institut de Droit International*, pp. 275—301. Bruxelles. 1888.

Both M. Perels, and Professor Geffcken, who was his chief opponent, handled the subject in a very ethical way, relying rather on moral principles and the opinions of the more philosophical class of writers, than on any deductions from actual cases on record. As the instances of so-called Pacific Blockade are not very numerous, it is not difficult to examine each in some detail in order to discover their true nature. If this be done, it is submitted by the present writer that the following underlying principles come to light :—*Firstly :* in every recorded case the blockaded State has been overwhelmingly more powerful than the State whose ports are blockaded, so superior in strength, in fact, that the proceedings were really nothing more than an armed coercion of a feeble State into some course demanded by a strong one. Such a situation has all the effect which a war definitely declared would have (open war in fact not being necessary owing to the great disparity of resources), without any of the responsibility or gravity implied by the latter. The suffering party has always been either a minor European State, such as Greece in 1827 and 1886, or a comparatively insignificant State like the South American Republic. Very often the blockade has been made under the supervision of all the Great Powers in accordance with the Concert of Europe, or by two or more European powers in the exercise of that controlling supervision which they always affect in dealing with non-Caucasian races.

Secondly : As has been previously noted, the object has always been either (*a.*) to obtain satisfaction by means falling short of war for some damage caused by the other State, or (*b.*) to influence the conduct of such other State by the process, which has always existed, though never theoretically justified, of direct intervention in its affairs.

The best examples of the former class are the blockade of Rio Janeiro in 1862 by Great Britain, and the Formosan Blockade, in which the French Government openly avowed

that the reason for its institution was "l'état de représailles existant entre la France et la Chine." The latter class is most aptly exemplified in the blockades of Greece in 1827 and 1886 already referred to on more than one occasion.

With regard to the first class, since reprisals are legitimate, a Blockade of a port by way of reprisals would be valid; but, as Professor Geffcken justly argued, it should in such a case not exceed the scope of an ordinary act of reprisals, *i.e.*, it should not interfere with third parties in any way. This is undoubtedly the strongest argument against the old kind of Pacific Blockade; but as nearly all European nations have, at some time or other, either instituted blockades affecting neutrals, or acquiesced in them in the capacity of neutrals, it is questionable whether any one of them could at the present time consistently demur to a proceeding of the kind in question.

The Greek Blockade in 1886, however, in which nearly all the Great Powers joined, might perhaps be taken to represent a tacit rejection of the old kind of Pacific Blockade, and the recognition of the doctrine that neutrals should not be affected by it.

In the second class of cases where the underlying principle is that of Intervention, it is obvious that the disparity of strength previously referred to, must exist in order to render the step effectual. Although Intervention is *primâ facie* indefensible, yet if, as a famous International Jurist once said, "*its essence is illegality, and its justification is its success*,"* there can be no doubt that all the instances of this class were justifiable, if they were not legal.

Professor Geffcken, in the course of his argument before the Institute, disputed the validity of the Greek Blockade of 1886, on the ground that if it had been sought to be imposed on the ports of a more powerful State, it would

* *Letters of Historicus.* Lond. 1863. p. 41.

infallibly have been regarded by the latter as a *casus belli*. This argument, however, would apply to all cases of Pacific Blockades, whether by way of reprisals or Intervention.

It is the very certainty of success which allows a State to resort to means of redress short of war in place of open belligerency.

On the whole, it seems probable that in future the precedent of 1886 is more likely to be followed than the earlier cases. The method then adopted would be quite as effectual, and free from the difficulties, and even dangers, to which the old method gave rise in respect of neutrals or quasi-neutrals.

Whether the rule of merely "detaining" ships which attempt to break such a Blockade would be adhered to in cases where the latter is *by way of reprisals*, seems doubtful; but there is no reason for not conforming to it in all other cases.

The Institute of International Law, in its final declaration on the subject, was altogether in favour of the more lenient view, and it may be useful to quote the propositions carried at the Heidelberg meeting as indications of modern Juridical opinion.

They were as follows* :—

"L'établissement d'un blocus en dehors de l'état de guerre ne doit être considéré comme permis par le droit des gens que sous les conditions suivantes :

"1. Les navires de pavillon étranger peuvent entrer librement malgré le blocus.

"2. Le blocus pacifique doit être déclaré et notifié officiellement et maintenu par une force suffisante.

"3. Les navires de la puissance bloquée qui ne respectent pas un pareil blocus peuvent être séquestrés. Le blocus

* *Annuaire de l'Institut de Droit International*, 1888, p. 301.

ayant cessé, ils doivent être restitués avec leurs cargaisons à leur propriétaires, mais sans dédommagement à aucun titre."

In concluding this part of the subject it might be well just to mention the recently declared anti-slavery blockade by the British and German squadrons on the East coast of Africa. This can hardly be regarded as falling within the scope of either Blockade proper or Pacific Blockade. Zanzibar, the State chiefly affected, is acting in perfect harmony with the blockading Powers. The despatch from the Foreign Office of the 1st November last intimated to the Sultan of Zanzibar that the Blockade was to be established, "in conjunction with His Highness, over his continental "dominions, in order to cut off the importation of munitions "of war to his insurgent subjects, and to put a stop to the "exportation of slaves."

It is, in fact, nothing but an unusually vigorous co-operation on the part of European Powers to put down the Slave trade, and as such possesses a significance purely historical and moral.

III. Having now discussed the two chief points of contention which have arisen in the last few years, it will be necessary to glance much more briefly at several other cases of less magnitude but equal interest. The first that may be mentioned is that of the Filibustering expedition to Venezuela, which came before the Divisional Court of the Queen's Bench Division in March, 1887, *sub nomine Reg.* v. *Sandoval.** It affords a capital illustration of the stringent operation of the Foreign Enlistment Act, 1870. That Statute, which was passed during the excitement caused by the Alabama claims, when our relations with the United States were exceedingly strained, undoubtedly introduced innovations into the existing Laws of Neutrality harsher and

* 16 Cox, C.C., p. 206.

more far-reaching than, at the present day, in the calmer light of reason, appear to have been either necessary or expedient. It imposes upon British subjects, in favour of foreign belligerents, a heavier liability than either general principles of International Law require or foreign States reciprocally impose on their own citizens.

Since the Act does, in fact, exist, however, the decision of the Court in the present case seems to have been a perfectly reasonable application of it. The facts are probably still fresh in the mind of the legal reader, the point at issue being this :—Whether Colonel Sandoval, a foreigner temporarily resident in England, had been guilty of a violation of Sec. 11 of the Act, in shipping arms and ammunition, purchased in England, to Antwerp, and there transferring them, and embarking himself on board a ship, the *Justitia*, which was afterwards handed over to certain Venezuelan insurgents, and utilised for aggressive purposes against the Venezuelan Government.

Sir William Call, the original owner of the *Justitia*, and one Baird, were also indicted with Colonel Sandoval, in the Queen's Bench Division, under a writ of *certiorari*, for the acts complained of. The jury disagreed as to the former, and the Crown withdrew the charge against Baird, but Sandoval was convicted. The Divisional Court was moved for a new trial, and decided without any hesitation that the defendant had been rightly convicted of "within Her Majesty's dominions, and without the licence of Her Majesty . . . . preparing and fitting out a naval or military expedition to proceed against the dominions of a friendly State" (Sec. 11).

The Court thought "there was abundant evidence of a preparation and fitting out" by the defendant in his having bought the guns and ammunition which were eventually used on board, the *mala fides* being very apparent throughout the whole transaction.

It is noteworthy that the count against the defendants under Sec. 8 was abandoned at an early stage of the proceedings, and it might reasonably be questioned whether that Section would ever cover cases of this kind, where there is no such recognised state of belligerency as to admit of the application of the words in the Act, "In the military or naval service of any foreign State *at war* with any friendly State."

This decision forms a fitting corollary to those in the cases of *The Gauntlet* * and *The International*,† which arose during the Franco-Prussian war. A consideration of the facts suggests at once the alarming extent to which the Act of 1870 might be strained, so as to render penal, acts really innocent in themselves. The three *ex-post facto* rules on which the Alabama Commissioners affected to base their decision, and which were afterwards adopted for future application in the Treaty of Washington, were sufficiently onerous to British interests; but even these would not be so oppressive in their effects as a strict construction of the Foreign Enlistment Act.

It is, indeed, difficult to conjecture what are the precise limits of possible liability under the Act. The terms employed are in many cases as incapable of definition as the "due diligence" which renders the "Alabama" rules so incomprehensible and unsafe.

A person may incur the penalties imposed by supplying materials or building ships, not only if he believes and knows that they will be used against a friendly State, but if he has some "reasonable cause to believe" that they will be so used on some contingency unrestricted in remoteness, and unlimited in point of time, at least as far as the express terms of the Act are concerned. It would require a somewhat delicate power of discrimination to

* L.R. 4 P.C. 184. † L.R. 3 A. & E. 321.

decide which is the more to be condemned, the panic-born policy which introduced the novel principles of the Act, or the ambiguous draftsmanship which formulated its terms.

IV. Two interesting cases, both, curiously enough, relating to Venezuela, were decided upon the same day, in February, 1888. One raised an important question as to the exemption of Diplomatic personages from legal proceedings, and the other as to the position of *de facto* governments. In the former, the action was that of *The New Chili Gold Mining Co.* v. *Blanco and another* (4 *Times Law Reports*, p. 346), for £280,000 damages, for alleged slander of the Company's title to a certain concession to the Company, and conspiracy, alleged to have been entered into in this country, to dispose of the concession to other parties in fraud of the plaintiff Company's rights.

One of the defendants, General Blanco, was a former President of the State of Venezuela, and at the time of these proceedings represented that country as Plenipotentiary to France, and was in that capacity resident in Paris.

Upon an affidavit setting forth the facts, an order had been made by a Judge in our own country to allow process to issue against him out of the jurisdiction, and he had actually been served with a writ of action in Paris. The present application was to have the latter set aside on the ground that at the time of service General Blanco was an accredited and received Diplomatic representative at the French capital.

It is obvious that had he been a Plenipotentiary to our own instead of to a foreign Government, the writ could not, consistently with the well-established principle of International Law, have been served upon him. This was the object of express decision by Lord Campbell in the case of *The Magdalena Steam Navigation Co.* v. *Martin* (2 E. and E., 94), and is generally recognised as the rule

(apart from special circumstances which need not be discussed here) adopted by the Courts of all civilised nations. The original ground was long ago stated by Grotius to be that no coercive proceedings should be allowed to embarrass a foreign minister—"*omnis coactio abesse a legato debet.*" *

The point in the present case was, unfortunately, not expressly decided, except in so far as it influenced the Judges in exercising the discretion conferred upon them by Ord. XI., R.S.C. The Court gave judgment in favour of the defendant on another ground, *i.e.*, that the circumstances were not of such a kind as to bring the case within the scope of Rule 1 of the Order, so as to allow of service out of the jurisdiction. The two Judges, in the course of their decisions, delivered more or less conflicting *obiter dicta* upon the International point.

Huddleston, B., considered "that the privilege of Ambassadors ought not to be extended beyond Ambassadors in our own country;" while Manisty, J., thought that the principle expressed by Lord Campbell that "an ambassador must "be left at liberty to devote himself body and soul to the "business of his office"† would be "violated by compelling "a foreign ambassador to a foreign country to appear and "defend himself in our Courts."

A very delicate question is thus left *in statu quo*, and it does not seem very probable that it will soon arise again, since it is one practically confined to the Courts of a State like our own, which allows writs in certain cases to issue out of the jurisdiction.

Reasoning from a historical point of view and on general principles, it might be submitted with some degree of confidence, that the opinion of Mr. Justice Manisty was the more correct one. There seems to be no reason for

* *De Jure Belli et Pacis*, lib. ii., c. 18, s. 9. [Whewell's Ed., Vol. II., pp. 216-17.—Ed.]

† 2 E. & E., at p. 111.

applying a different rule in the case in question, from that which always holds good in a case like that of the *Magdalena Steam Navigation Co.*, previously cited. The element underlying each is identical. The unique idea of sanctity attaching to a Public Minister exists with respect not only to the State to which he is accredited but also to the world at large. The rule absolving Ambassadors from liability to Judicial process is based as much on Expediency as on mere Sentiment, and the aphorism of Grotius, quoted above, seems to have been designed with the widest possible application.

In any case, it is probable that as long as the service of writs out of the Jurisdiction continues to depend ultimately on the *discretion* of the Judge, very cogent reasons would have to be shewn before such service would be allowed on a foreign Ambassador residing in a foreign country.

The Republic of Peru v. *Dreyfus, Brothers & Co.*, 4 *Times Law Reports* 333, also decided in February, 1888, raised what the Judge called "a question of International Law of the "highest importance, whether or not the citizens of a "foreign State may safely have commercial dealings with a "revolutionary government which for international and "diplomatic purposes has been recognised by such a State "as a government *de facto* if not *de jure*."

The case in question was full of details both remarkable in themselves and interesting to the student of International Law. The facts are of too complex a nature to be here set forth in full, but the material features are concisely and clearly stated in the elaborate judgment of Mr. Justice Kay.

Dreyfus, Brothers and Co. were French subjects, having a financial house of business in Paris, and a branch at Lima, in Peru, and for some considerable period they had been engaged in vast commercial transactions with the Government of Peru for the purchase of guano.

In 1869 they entered into a contract with the latter Government, as it then existed in its Republican form, for the purchase of two million tons of guano at a fixed price, subject to certain conditions expressed in the memorandum of agreement. One of these conditions (Art. 33 of the contract) provided that "all the differences to which the present contract may give rise, shall be decided by the "tribunals of the Republic of Peru," and the Company covenanted specifically to submit themselves to the decision of such tribunals.

In 1878 some differences arose as to the amount then actually due on the contract, the Company claiming against the Government a sum equivalent to £4,000,000, English money, while the Government contended on the other hand that the accounts shewed a balance in their favour of nearly £100,000.

Just about this time war broke out between Chili and Peru, and in December, 1879, Sr. Nicolas de Pierola became Dictator of the latter country, the previously existing Republican Government being overthrown. In 1880 Sr. Pierola was recognised by this country and by France and other European States as the supreme ruler of Peru. Negotiations were renewed between the Company and the new Government, and in 1880 a new contract was entered into by which the previous agreement was cancelled. Article 33 of the former was, however, virtually reiterated, and it was settled that the questions in dispute were to be determined by the Tribunals of Peru within six months.

In response to a petition, and with the express acquiescence of the Company, Sr. Pierola shortly afterwards issued a decree, directing that for that particular case the laws of Peru regulating the proceedings in contentious business should be abrogated;—thus practically constituting himself, in his capacity of Dictator, sole arbiter

as between the Company and the Government. Acting under the exceptional powers with which he was thus invested, he proceeded to issue seven awards on the matters in dispute, subject to the Tribunal of Accounts of Lima settling the arithmetical part of the financial transaction. The latter ultimately prepared a statement of account, showing a balance due to the company of over two and a quarter millions. This was subsequently increased by further awards, and the bills of lading of eleven cargoes of guano were handed over to the Company in part liquidation of the debt. In November, 1881, Sr. Pierola resigned, and was succeded in the Dictatorship by Sr. Iglesias, who remained in power till December, 1885.

In 1886 the Republican form of government was restored, and the Congress thereupon passed an Act annulling all the internal acts of Sr. Pierola. The action was brought by the new Administration, on the strength of the claim by the previous Republican Government of a balance in their favours against the Company to restrain Messrs. Dreyfus from dealing with the eleven cargoes of guano referred to. The present Interlocutory application was for the payment out of Court of a sum of money equivalent to the amount claimed. Mr. Justice Kay, in deciding this latter application, practically gave judgment on the main question. He said, "If this were the trial, I should decide against the plaintiffs without the slightest hesitation. . . . The plaintiffs' counsel have been unable to cite, nor can I find, any authority whatever in favour of their contention." The *ratio decidendi* seems to have been perfectly in accordance with well-established principles of International Law. He argued from reported cases* that the doctrine was well-established that if a Government or Sovereign is ousted

* The cases cited by the learned Judge included the following:—*United States* v. *Prioleau*, 2 H. & M. 559; *United States* v. *M'Rae*, L.R. 8 Eq. 69; *Gelston* v. *Hayt*, 3 Wheaton (Am.) Rep. 324, and *The Pelican*, 3 Wh. Appx. D.

and temporarily superseded by another Government or Sovereign power, and the *de facto* Government or Sovereign Power incurred liabilities as against a foreign State, or the subjects of a foreign State, the *de jure* Government, on its restoration to power, is bound to satisfy such liabilities. So, in the present case, Sr. Pierola, as Dictator, represented the Government of Peru (*de facto*), and as such incurred liabilities towards Dreyfus Brothers, and therefore the restored Government was bound to fulfil such obligations.

This principle had been clearly enunciated in several American and English cases, and especially in the judgment of James, V.C., in *United States of America* v. *M'Rae*, L.R. 8 Eq. 69.

So in *United States* v. *Prioleau*, 2 H. & M. 559, the English Court held that a contract for sale of goods between one of the rebel States of America and a citizen of this country was binding on the American Government after it had re-asserted its authority, although the insurgent Government of the Confederate States had never been recognised by the British Government. *A fortiori*, the same principle would hold good in a case like the present, when the *de facto* authority had been almost universally recognised.

The difficulties which would be caused by the adoption of a contrary opinion were well illustrated by Mr. Justice Kay in a *reductio ad absurdum*.

"Obviously it would follow," he said, "that no English-"man could safely contract with the present Government "of France, or, indeed, with any existing Government, lest "it in turn should be displaced by another Government "which might treat its acts as void." Such a state of things would clearly be preposterous. International Law, in short, does not deal with the Ethics of internal politics; it regards simply States as they actually are, and cannot be called upon to discriminate between *de facto* and *de jure* Governments.

Whether the decision in the extreme case of *U.S.* v. *Prioleau* can be taken to reflect accurately the general principles is open to some doubt. A Government can hardly be regarded even as *de facto* unless its identity is recognised to some extent by other Governments. Perhaps the fact that the Confederate States were at an early stage of the quarrel recognised as true *belligerents*, if not as an independent Government, may afford some explanation. In this present case, however, there seems to be no doubt that the decision was perfectly just on general grounds, even apart from the binding authorities cited.

V. The Monroe Doctrine, since it was first formulated in 1823, has been so frequently discredited and disavowed by individual authorities, that there was until lately some reason to doubt whether it still represented the true tone of American policy.

The recent collapse of the Panama Canal scheme, and the possible intervention of the French Government consequent thereupon, have, however, evoked between them a very extraordinary illustration of its application.

On December 19th of last year a Resolution was introduced into the American Senate by Senator Edmunds (Vermont) which amounted to a specific declaration deprecating the official connection of any European Government with the Panama Canal.

The matter was at first referred to the Judiciary Committee, and was finally debated in the Senate itself on the 8th January. The proceedings excited considerable interest on the part of the members of Foreign Embassies who thronged the gallery of the House to hear the continuance of the debate, but were disappointed owing to the Senate taking the somewhat unusual step of discussing the question in a Secret Session.

After a lengthy debate the original Resolution was passed by 49 votes to 3, in the following terms:—

"That the Government of the United States will look
"with serious concern and disapproval upon any connection
"of any European Government with the construction or
"control of any ship canal across the Isthmus of Darien
"or Central America, and must regard such connection or
"control as injurious to the just rights and interests of the
"United States, and a menace to their welfare. That the
"President be requested to communicate this expression
"of the views of Congress to the European Governments."

The motion must, of course, be passed by the House of Representatives, and receive the Signature of the President, in order to have the force of Law as an Act of the United States. Whether this final ratification will take place is uncertain, but at least the Resolution will present a clearer expression of Senatorial opinion on the principle in question than has ever been previously given.

It may be observed that no mention is made of the Monroe Doctrine as such, and, perhaps, the case can hardly be said to fall within the scope of the doctrine at all if the latter is construed in the strictest form in which it was at first promulgated. The propositions enunciated by President Monroe in 1823 were really three in number, the first being a renunciation on the part of the United States of any claim to interfere in European politics, while the other two were directed against (*a*) future Colonisation in America by European Powers, and (*b*) the extension to the American Continent of the "*Continental System*." There is no doubt that each of these latter was prompted by a specific incident, consisting in the former case of the Russian acquisition of the North-West territory, and in the latter of the threatened action of the Holy alliance to restore to Spain her revolted South American colonies.

The case contemplated in the present Resolution would scarcely come under either of these heads, but it is well within the *ratio legis*, if such an expression be permissible

in this connection. The doctrine, in so far as it has been adopted by subsequent Presidents as indicative of their policy, has been accepted in its underlying principles rather than in its precise original words. This is very clearly exemplified in a note of Mr. Cass, Secretary of State, in 1858, in which he said: "The United States will not consent to the subjugation of any of the independent States of this Continent to European Powers; nor to the exercise of a Protectorate over them, *nor to any other direct political influences to control their policy or institutions.*"

President Polk, in his Annual Message in 1848, also reiterated the principle, and Mr. Secretary Fish, in 1870, reported that the "United States stand solemnly committed by repeated declarations and repeated acts to this doctrine." It may be observed in passing that the latter statement is a little extravagant. The doctrine has frequently been repudiated, as representing merely the opinion of individual Administrations. In the discussions on the Clayton-Bulwer treaty in 1855-56, Mr. Clayton went so far as to say that "whenever the attempt has been made to assert the Monroe Doctrine in either branch of Congress it has failed." The recent Resolution of the Senate is, however, a direct assertion of the essential principles of the doctrine, and, if ratified, it may have the effect of making it part of the Law of the United States.

This is not the place to discuss the legitimacy of the Resolution, but certain remarkable features in it may be pointed out. Its justification will, perhaps, as in other kinds of International intervention, depend to a great extent on its success, which, of course, is a matter for the future. If the United States Government intend to vindicate the principle thus laid down *vi et armis*, serious complications may arise. In Europe a similar declaration by any great Power would, under certain circumstances, almost infallibly produce disastrous consequences. In respect of the affairs

of the Western Hemisphere, however, a degree of latitude must be allowed to a Power which, like the United States, is the party chiefly interested. Mr. Secretary Fish, in the Report above referred to, disclaimed any idea of aggression in connection with the policy based on the Monroe principle. "It looks hopefully," he said, "to the time when America shall be wholly American;" an observation which, however, somewhat suggests an *arrière pensée* in favour of the last word being read as "United States."

It will be interesting to watch the development of affairs arising out of the incident under discussion, though we may not be altogether free from misgivings as to the result.

Having now reviewed in more or less detail most of the questions mentioned at the commencement of this Paper, it only remains to glance in a cursory manner at one or two minor points which have recently arisen.

VI. There have been numerous instances in the last few years of the various recognised modes of acquisition of new Territory. The chief fields have naturally been Africa and the Polynesian islands. In the former most European Powers have acquired large districts by purchase, treaty, conquest or direct annexation. The institution of huge trading Companies, on the principle of the old East India Company, has been a very active agent in establishing European dominion in the Dark Continent. Various well known cases are those of the Royal Niger Company and the British and German East African Companies and the "Colonial Company for S.W. Africa." An examination into the growth and position of the Congo Free State will amply repay the student of International Law, but is far too large a subject to be dealt with on the present occasion. The British annexation of Burmah and Socotra and that of parts of New Guinea by Great Britain, France, and Germany in 1885 and 1886 are very good instances of the principles which they illustrate. The peculiar influence which France

has assumed over the affairs of Madagascar is a curious instance of a combination of the International doctrines of Intervention and Acquisition.

In conclusion, it may be mentioned that the introduction in recent years of more amicable modes of settling disputes between States is not the least welcome feature in the development of International Law. Congresses, Conferences, Arbitrations, and Commissions are more resorted to now for the preservation of harmonious relations than ever before. There are various reasons for this fact. The extraordinary improvement in naval and military weapons and armaments; the intimate relationships between various nations which have been evoked by the necessity of preserving the Balance of Power; the hesitancy which one State must necessarily feel in kindling a spark which may set half the world in a blaze, all these combine to maintain peace. Whether the necessity of War might not be obviated altogether is a problem which cannot as yet be regarded as solved, but at least the ultimate end of International Jurists will continue to be, as it has been from the time of Grotius downwards, to stave off War as long as possible, and to mitigate its horrors when it can no longer be avoided.

JOHN M. GOVER.

II.—THE UDALLERS AND THE LOCAL GOVERNMENT BILL (SCOTLAND).

WE have been favoured with the text of a *Memorial*, drawn up by the Executive Council of the Udal Rights Association of Orkney and Shetland, for presentation to the Secretary for Scotland, in view of the forthcoming Local Government Bill for Scotland.

This *Memorial* deals so fully with the questions raised by the present representatives of the ancient Udallers, and the

questions themselves are of such intrinsic Historical interest and Constitutional importance, that we gladly take the opportunity of giving the subject-matter of the *Memorial* a permanent place in Legal literature by printing the text in the pages of this *Review*. In so doing, we must, of course, be understood as simply opening our pages to matter of interest to the Legal reader, without thereby taking a side, as a *Review*, in any controverted questions which may be raised in the *Memorial*. But in regard to the Legal and Historical points involved, we may, perhaps, without intruding upon any controverted matter, usefully touch, though necessarily very briefly, on some heads of the *Memorial* which seem to be capable of further development or illustration.

The fact, alleged in the *Memorial*, of the substantially independent existence of the Earldom of Orkney and Shetland, under a line of Jarls, or Earls, only owning a bare nominal suzerainty—to borrow a term of Feudal Law—in the Crown of Norway, requires no confirmation at our hands. This, indeed, is only what the student of History would expect under the given circumstances. For, similarly, on the Mainland of Scotland, and even in England, where the central government was somewhat more powerful, the position of an Earl tended to local autonomy with a merely nominal recognition of the King. The epithet *sub-regulus*, applied to Earl Harold on the Bayeux Tapestry, expressed the truth, more or less, as to all Earls, shortly before the incoming of the Norman. Such an Earl as Harold might easily, as he did, develop into King, *i.e.*, the *sub-regulus* became *Rex*. So in Scotland, the Earl, or *sub-regulus*, Macbeth, easily developed into Macbeth the King. Perhaps the only wonder is that the same process was not repeated in the persons, or at least in the families, of the Earls Paul and Erlend. Probably their substantial independence, coupled with the support of a nominal suzerain, was felt by the Earls of Orkney of the Scandinavian Dynasty

to give them a more assured sense of power than they would be likely to gain from the breaking of the very slight link which bound them to Norway. As it was, they had Norway in the background, so to speak, and to that extent they were content to be counted Norwegians down to the Impignoration.

The questions, interesting as they are from the point of view alike of International and of Constitutional Law, regarding the latent power of redemption of the Islands on the part of Norway, may probably be considered as being, in the main, Academic. Yet they cannot perhaps with safety be altogether set aside, and they therefore deservedly have a place in the *Memorial*. It is obvious that in the event, however remotely possible, of a claim to redemption being put forward, certain Legal and Financial considerations advanced in the *Memorial* would not be neglected on the side of Norway.

How far the superseding of the Native Laws of Orkney and Shetland by the so-called "Country Acts," and their eventual displacement on almost all points, by Scottish Law pure and simple, may be justifiable under the peculiar circumstances of the case, we must leave to the British Government of the Future to establish when Norway shall reclaim the Islands, with their rights and privileges intact — if that day should ever come.

The position of the Udaller is an extremely interesting survival of pre-Feudal Europe. In the days when everything was feudalised, Allodial holdings came to be called, on the Continent, Fiefs held of God and the Sun. Except in the sense of the Feudal doctrine which made of God the Arch-Suzerain, Allodial ownership is not strictly a Tenure at all. It is the fullest and freest ownership in land known to the individual, under God and the Sun.

That the existing Government of the Orkney and Shetland Islands should give the Udaller the security which he seeks for his ownership through a Legal certificate thereof,

is a matter deeply affecting the general sense of security which the Crown is bound to afford landowners just as much as the owners of other kinds of property. Those who are interested in the particular question as to Udal rights and the old *Schynd* Courts, may be referred, on that as on other points raised in the subjoined *Memorial*, to an article from the pen of Mr. A. W. Johnston, in the *Law Magazine and Review*, No. CCLXIX., for August, 1888, on *Law and Self-Government in Orkney*.—ED.

Memorial

Adopted at a Meeting of the Executive Council of the UDAL RIGHTS ASSOCIATION OF ORKNEY AND SHETLAND, held in London, on 4th February, 1889.

Unto the Most Honourable the MARQUIS OF LOTHIAN, K.T., Secretary for Scotland, the MEMORIAL for the *Udal Rights Association of Orkney and Shetland*, SHEWETH:

Your Memorialists beg leave respectfully to submit the following statement of the grievances to which Orkney and Shetland have long been subjected; and humbly request that, as far as possible, due provision may be made, for the redress of these wrongs, in the forthcoming Local Government Bill for Scotland.

PART I.

BRIEF STATEMENT OF CASE.

1. THE case may be briefly stated thus:—In 1468-69, the Sovereign rights over Orkney and Shetland were pledged by Norway to Scotland, without any limitation being stipulated as to the time of redemption, and they have never since been redeemed. These Islands continued undisturbed in the exercise of their native system of independent government and taxation for about a century

and a-half after their transference to Scotland, their rights being specially recognised by the Scottish Parliament.

The Earldom, or Executive Government of Orkney and Shetland, was acquired by Scotland in 1471; and was thereafter, from time to time, leased or farmed to various disponees.

During the Sovereignty of Norway, and down till 1597, the expenses of the Government of the Islands were solely defrayed by a land tax called "*skatt.*" *

In 1597, when the Crown lands in Scotland began to be assessed in land-tax, the occasion was used as an excuse for likewise introducing that tax in Orkney and Shetland (on the plea of their being Crown property), in addition to, and without abolishing the Norwegian land-tax or *skatt.* This double land-tax continues to the present day.

In 1748, upon the abolition of the Scottish Heritable Jurisdictions, the Crown disponee of the Earldom of Orkney and Shetland, while discharged from the government of the Islands, was allowed to retain, as his private estate and revenue, the whole Earldom skatts, lands, and revenues, which had for nine centuries supported that government. The *skatts* are now two and a-half times more than their original and proper amount, having been fraudulently increased by the Crown disponees.

The entire Bishopric Estate of Orkney and Shetland has been diverted, and the remaining revenues are still applied, to non-local purposes. The landed estate has been sold by the Commissioners for Woods and Forests, and the proceeds are reported to have been granted to the London Parks.

PART II.

HISTORY.

Former Political Privileges of Orkney and Shetland.

2. In order to form a correct judgment of the particular grievances of Orkney and Shetland now under considera-

* Cf. *escot, scot* = contribution, assessment (German: *Schatzung, Schoss*).

tion, we should bear in mind the special political privileges enjoyed by these Islands at the time of, and for a considerable period subsequent to, their acquisition by Scotland. Because, it was the violation of these rights, which gave rise to the many wrongs to which these Islands have been so long, and to a great extent are still, subjected, and for which special legislation is now desired.

Your Memorialists therefore beg to submit a brief historical statement of the subject.

NORWEGIAN SOVEREIGNTY AND GOVERNMENT.

Earldom.

3. The Earldom of Orkney and Shetland was founded about the beginning of the tenth century, by King Harald of Norway, and placed under the Executive Government of a hereditary line of Earls who acted as the chief administrators of justice, and the collectors of the Royal revenues derived from fines and land-tax or *skatt*.* The occasional investiture of the Earls, more especially in cases of disputed succession, was the only sovereign prerogative exercised; and, as the Islands paid no Imperial tribute, they thus practically enjoyed legislative, fiscal, and defensive independence, under a sovereignty little more than nominal.

Taxation.

4. *Skatt*,† or land-tax, which was assessed on the cultivated lands, was the only tax levied for the support of the Local and Imperial government. The Earls of Orkney, from the very first, retained the whole Imperial taxes, and paid no tribute to the Crown of Norway, on account of their having to carry out the defence of the Islands at their own cost.‡

* Mallet's *Northern Antiquities* (Bohn's Ed.), p. 280.

† See *post*, Appendix.

‡ *Orkn. Saga*, Anderson's Ed., p. 2, where *skatt* has been translated *tribute*.

Land Tenure.

5. Land was held by Udal tenure, *i.e.*, as a perfect freehold—held solely by uninterrupted succession, under no feudal superior, not even the King, and without charter or other written title. There was no liabilty to render any service or tribute, except such as was self-imposed by the landowners themselves in Parliament, to meet the wants of their government.

Franchise.

6. All the landowners (Udallers), and their kindred (Udalborn), were hereditary members of their one-chambered parliament, the *Al-thing* or *Lawting*, which acted in the double capacity of legislature and judicature.

SCOTTISH SOVEREIGNTY AND GOVERNMENT.

Orkney and Shetland pledged to Scotland.

7. On the marriage of the Princess Margaret of Norway and Denmark to King James III. of Scotland, in 1469, her dowry included the permanent cession of the Hebrides and the Isle of Man, and a sum of 60,000 Rhenish florins. Only 2,000 florins of that sum being available, the sovereign rights over Orkney and Shetland were impignorated or pledged for the balance of 58,000 florins, or about £24,000 sterling.

The Islands have never been redeemed; and, as there was no limitation stipulated as to the time of redemption, the question of Norway's right to recover them has been frequently raised. So late as 1667, at the Treaty of Breda, it was declared that Norway's right was unprescribed and imprescribable.*

The Instrument of Impignoration, which was incorporated in the marriage contract, simply transferred the sovereign

* Torfæus, *Orcades*: *Exchequer Rolls of Scotland* (Ed. by G. Burnett, Lyon King of Arms), Vol. VIII, Preface; *Proceedings* Soc. Ant. Scotland, 1887, pp. 236—251.

rights over the Islands to Scotland until redeemed, so that the Islands themselves would not be affected by the transaction further than having to recognise the sovereignty of Scotland.

It is generally acknowledged that Scotland, both on account of the temporary nature of the pledge, as well as by the tenor of the Instrument of Impignoration, was bound to—and did at first—uphold and respect the native laws and customs of the Islands.*

We accordingly find the customary relationship between the Orkney and Shetland Courts and those of Norway, continued unimpaired; † and so late as 1662, the King of Norway granted a charter of confirmation of the sale of certain lands in Shetland.‡

The Earl of Orkney, after the Impignoration, continued in the full exercise of his government; and Scotland, at first, derived no pecuniary benefit from the Islands.

Earldom acquired by Scottish Crown.

8. Scotland had done all in her power to obtain the permanent cession of the Islands, but failing in that, set about realising her object in another way. By a series of transactions, from 1470-71, the Crown of Scotland, with the concurrence of the King of Norway, acquired the Earldom or governorship of Orkney and Shetland from the last Norwegian Earl.§ The Earldom was thereupon annexed to the Crown by Act of Parliament, not to be conferred upon anyone except a lawful son of the King.||

* Buchanan's *Life of James III.* Bankton, Bk. i., p. 343, &c.

† Mackenzie's *Grievances of Orkney*, App. Balfour's *Memorial, &c.*

‡ *Proceedings Soc. Ant.* Scot., 1879, p. 13.

§ *Register of the Great Seal of Scotland.*

|| *Act. Parl. Scot.*

Earldom Farmed Out.

9. Instead of the foregoing reservation being observed, the Earldom was forthwith farmed out, mortgaged, and granted "irredeemably" to various sets of Scottish courtiers down till 1748. The first revenue which Scotland drew from the Islands was the annual rent from the first lessee, beginning with the year 1472-3.*

The government of these lessees, or disponees, was at first carried out on exactly the same lines as had been laid down by the Norwegian Earls.

The native laws of the Islands were confirmed by the Scottish Parliament in 1567, a century after the Impignoration. The Scottish disponees, down till 1611, were bound by their commissions to hold the Law-ting, or Parliament of landowners, and to govern the Islands by the native laws, and not by those of Scotland.†

Upon the destruction or purloining of the native laws, c. 1600, new codes, called "Country Acts," were begun, and from time to time added to by the Law-tings and Sheriff Courts of Orkney and Shetland; but this was now in subordination to the laws of Scotland.

Church Government.

10. In 1490, and again in 1614, the Bishopric of Orkney and Shetland was erected into a Regality, with Civil jurisdiction, courts, and officials, separate from those of the Earldom. In 1614, by a mutual exchange between the Earldom and Bishopric estates, the latter, from being scattered throughout Orkney and Shetland, were concentrated into 7½ parishes in Orkney. From this new district the Bishop drew all the taxes or *skatts* for the support of his civil government.

* *Exchequer Rolls of Scotland*, Vol. VIII.

† James VI.'s Charter to Earl Patrick in 1600; *vide* Peterkin's *Notes*, App., as also the Commissions to the various disponees, preceding that date.

Upon the disestablishment of Episcopacy in 1689, the Crown took possession of, and has since held, the revenues of the Bishopric.

Reduction of the Islands to a Scottish County.

11. The Government of the Islands was finally annexed to the Crown in 1748, upon the abolition of the Scottish Heritable Jurisdictions. Since then the "Country Acts" and the legislative powers of the Sheriff Courts of Orkney and Shetland, have fallen into disuse.

PART III.

GRIEVANCES.

Authorities Quoted.

12. Your Memorialists now proceed to allude to the oppressions committed by the Scottish lessee-governors, or disponees of the Crown. Their usurpations and extortions were invariably appropriated by the Scottish Government, which thereafter leased out the Earldom at a correspondingly higher rent. Detailed accounts of the government and oppressions of the Islands will be found in the Register of the Great Seal, Register of the Privy Council, Acts of Parliament, the evidence taken before the Royal Commissions appointed to enquire into the oppressions of Earls Robert and Patrick Stewart, and the Records of the Sheriff Courts of Orkney and Shetland.

Encroachments on Native Laws and Customs.

13. Having acquired the Executive power in the Islands (Paragraph 8, *suprà*) and therewith the control of the police and military, the Scottish Government inaugurated, through its agents, a slow but steady and systematic process of encroachment on native rights, prerogatives and patronage of government offices pertaining to the people; and of assimilating and subordinating the Insular laws and customs to those of Scotland.

Feudalising Udal Lands.

14. Udal land tenure, which still exists in Orkney and Shetland, is about the only remnant of their ancient customs recognised by the Scottish Courts and Law.

The oppressions of the disponees of the Crown have ever been directed against Udal tenure, endeavouring to feudalise the Udal lands, and so extort from them feu duties and casualties.

Earl Robert Stewart, in the sixteenth century, held "courts of perambulation," in which he confiscated Udal lands, restoring them afterwards feudalised. The charters granted in these cases narrated that the lands were to be held in perpetual feu and heritage for ever, for payment to the Earl and his heirs, of the *skatt* and *teind* duties, together with a sum of money in augmentation of the rental, more than ever the said lands paid before.* Earls Robert and Patrick Stewart dispossessed many Udallers for trivial and trumped-up causes.†

A combination of all these oppressions, together with the excessive and double taxation, has succeeded in almost completely expropriating the native Udallers, or farmer-landowners.

Want of Certificate of Udal Ownership.

15. Since the lapsing of the native laws and courts, the Udallers have no means of securing an appropriate certificate of lawful ownership, such as was provided by the Succession or *Schynd* Bills of the native *Schynd* Court.

Increase of Taxation by False Weights.

16. When these Islands were pledged to Scotland, their taxes were principally paid in agricultural produce according

* Peterkin's *Notes on Orkney*, p. 126.

† *Register of the Privy Council*: Peterkin's *Rentals*, No. II., &c.; Peterkin's *Notes*, pp. 119-120, and nearly every other account of the Islands during the Stewart Government

to Norwegian weights and measures. The mark, the smallest of these weights, consisted originally (as it still does in Norway and other countries) of eight ounces, or half a pound Dutch or Scotch weight; while 24 of these marks, or 12 lbs. made a *lispund*. These weights, although remaining nominally the same, were augmented one quarter by Earl Robert Stewart.* In 1691 the *lispund* was fixed at 34 lbs. Scotch in Shetland.†

In the middle of last century, the landowners in Orkney endeavoured to have the weights legally reduced to their original and true standard; but the Court of Session decided against them, on the plea of prescription. The mark, at that time, was about 20 ounces in weight, or two-and-a-half times more than its true standard; so that the taxes then, and still, paid upon these weights, are correspondingly excessive. In 1826, juries appointed by Statute 5 Geo. IV., cap. 74, s. 18, found the Orkney mark to be equivalent to 1 lb. 3 oz. 12½ drs. avoirdupois, and the *lispund* consequently = 29 lbs. 10 oz. 12 drs.; while the Shetland *lispund* was found equal to 32 lbs. avoirdupois, and the mark consequently = 1⅓ lb., nearly three times more than the original.

Double Taxation.

17. At the time of the Impignoration, and down till about the end of the sixteenth century, *skatt*, or land-tax, was the only public tax paid for the support of the Government of the Islands. This included Imperial taxation as well, which, as has already been stated (*suprà*, Paragraph 4), was all retained for the Government of the Islands.

The sole revenue derived by the Scottish Government, and that only after the acquisition of the Earldom, was the yearly rent paid by the Crown disponees.

* Evidence before Royal Commission; *vide* Balfour's *Oppressions in Orkney*.
† Mackenzie's *Grievances*, p. 59.

About the end of the sixteenth century, when the Crown lands in Scotland began to be assessed in land-tax, in common with other lands, the occasion appears to have been used as an excuse for likewise imposing Scottish land-tax on Orkney and Shetland, notwithstanding the fact that they already paid the Norwegian *skatt* or land-tax. In the first instance, the Scottish land-tax was charged against the disponee, who thereafter assessed the same on the Islands on the basis of the Norwegian or native system of valuation.*

To all appearances, the assessments by the disponees left a good margin for their profit.†

In 1649—53, Orkney and Shetland were re-valued in common with the Scottish Counties, and have ever since been burdened with Scottish land-tax in addition to the Norwegian land-lax or *skatt*. The new valuation of the Shetlands was never completed, and their proportion of Scottish land-tax continues to be assessed on the native valuation.

There has been a more or less constant protest and complaint against this oppression.‡ But the double land-tax continues to the present day.

It should be particularly noted that while the landowners have been permitted to deduct their teinds (after valuation) from the Norwegian teind duties paid to the Crown disponees, they have been denied a similar deduction for Scottish land-tax from the *skatt* duties or Norwegian land-tax paid to the same disponees.

* Peterkin's *Notes*, p. 150, foot-note: *Ibid*, App. p. 89; Mackenzie's *Grievances*, p. 107; Peterkin's *Rentals*, No. II., pp. 150—152.

† Peterkin's *Notes*, App. p. 89, "tent article."

‡ Petitions by inhabitants of Orkney and Shetland in 1633 and 1639; see *Act. Parl. Scot.*, Vol. V.: Action by landowners against the Earl of Morton in 1750: Memorial to the Treasury by the Commissioners of Supply for Orkney in 1853.

The loss thereby incurred by Orkney and Shetland may, in some measure, be estimated by calculating the amount of Norwegian land-tax which they have paid for the last three centuries, since the assessment of Scottish land-tax; or the amount of Scottish land-tax which has been paid during that period. To the remission of one or other of these accumulated sums, with interest, it is submitted, the Islands are certainly entitled.

It may be noted here that if Norway should ever succeed in redeeming Orkney and Shetland, the British Government would most certainly have to render an account of its intromissions with the government and taxation of the Islands, and make good all defalcations.

Alienation of the Bishopric and Earldom Lands and Revenues.

18. The climax of injustice was carried out in 1748, at the time when the Civil jurisdiction of the Islands was permanently annexed to the Crown. Because, since that time, the whole lands, revenues and taxes, which had for about nine centuries supported the government of the Islands, have been, without diminution, entirely applied to private and non-local purposes. The Earldom lands, *skatts*, and revenues were allowed to remain in the hands of the last disponee, the Earl of Morton, who afterwards sold the same to the predecessor of the present owner, the Earl of Zetland. The Bishopric revenues have been continuously applied by the Crown to non-local and secular purposes. A Royal Warrant, issued in 1825, directing that the revenues of the Bishopric should be applied to making roads and other improvements in the Islands, has never been carried into effect. All the Bishopric lands and some of the duties have been sold by the Crown, but none of the proceeds have been granted to the Islands.

PART IV.

Estimates.

Earldom.

19. The Earldom Jurisdiction lands, *skatts*, and revenues, were wadset to the Earl of Morton in 1643, and again to his successor in 1707, for £30,000 sterling, paying an annual feu duty of £500, and double that amount at the entry of each heir.

In 1653, the Earldom of Orkney and Shetland yielded a free-rent of about £2,400 sterling.

The Earl of Morton received over £7,000, for the withdrawal of his civil jurisdiction in 1748.

The Earldom lands, *skatts*, and revenues, were sold by the Earl of Morton to Sir Laurence Dundas, in 1766, for £63,000.

In 1812, the *skatts* and other duties alone yielded an annual revenue of £3,853 sterling (52 Geo. III., cap. 137). Allowing for the rise in the price of agricultural produce since 1812, these duties would yield a much larger revenue at the present time.

It is stated in the *Orkney and Zetland Chronicle*, No. 1, Dec. 10th, 1824 (known to have been written by Sheriff Peterkin), that after the passing of the private Act, 52 Geo. III., cap. 137, *skatts* and other duties of the Earldom, to the amount of £50,000, were sold by Lord Dundas, and it is also estimated that the Earldom estate at that time (1824) was still worth £150,000.

In the Parliamentary Return, 1872-73, the Earl of Zetland's rental in Orkney is stated at £5,817 17s., but this includes some private property over and above the Earldom.

The annual rental derived from the Earldom lands in Shetland for the year 1885, was £995 2s. 10d.*

* *Proc.* Soc. Ant. Scot., 1885, p. 245.

Bishopric.

20. In 1831, the revenue of the Bishopric amounted to £1,377 17s. 7d. 2-3rds sterling, of which, £555 0s. 9½d., was derived from land rents, and £822 16s. 10d. 1-6th, from *skatts*, &c.*

Some of the Bishopric duties and all the lands have been sold by the Crown for the sum of £50,465 17s. 9d. The revenue at present derived from the remaining duties averages about £700 per annum.

General Exactions.

21. In order to obtain an approximate idea of the amount of money which has been, it is submitted, illegally and unjustly exacted from Orkney and Shetland by the Scottish and British Governments and their disponees, it would be necessary to calculate the following items, adding interest to date:—

(1.) The amount of Norwegian land-tax paid by the Islands during the last three centuries;

(2.) The accumulated excess of *skatts* and other duties paid by reason of the false weights;

(3.) The accumulated feu and other duties compulsorily levied on Udal lands;

(4.) The accumulated revenues of the Earldom and Bishopric estates since their alienation from their proper Government purposes in 1748;

(5.) The present purchase value of the Earldom and Bishopric lands, *skatts*, and all other revenues.

PART V.

PROPOSED REFORMS.

Redress of Double Taxation, &c.

With reference to the foregoing statements, your Memorialists would beg humbly to request:—

22. (1.) That the double taxation payable from Orkney

* See *Reports* of the Commissioners for Woods and Forests.

and Shetland, and other similar grievances be partially redressed by the following items being handed over to the County Councils of the Islands, to be applied to local purposes :—

(*a.*) The whole remaining revenue of the Bishopric ;

(*b.*) The money received by the Crown for the sale of the Bishopric duties ;

(*c.*) The money received by the Crown for the sale of the Bishopric lands ;

(*d.*) The present purchase value of the Earldom lands now in the possession of the Earl of Zetland ;

(*e.*) The whole remaining duties of the Earldom in Orkney and Shetland ;

(*f.*) A sum equal to the money received by the Earl of Zetland and his predecessors for the sale of Earldom duties ;

(*g.*) The yearly feu duty of £500 paid by Lord Zetland to the Crown.

Compensation.

23. (2.) That the road debts of Orkney and Shetland be paid off, and the unredeemed Scottish land-tax transferred to the County Councils, in part compensation for the long duration of the double taxation, the alienation of the Earldom and Bishopric lands and revenues since 1748, and in consideration of the circumstance that the Islands have received little State aid in the past, in comparison with the Scottish counties.

Local Government.

24. (3.) That Orkney and Shetland be formed into two separate Counties, with power to their County Councils to appoint a Joint Committee to manage any common interests delegated to it.

CONCLUDING APPEAL.

No Exceptional Advantages Asked.

25. In conclusion, your Memorialists beg to state that they make no demand now for full compensation for the many grievances to which these Islands have been subjected, nor for any readjustment of the law affecting Udal land tenure; they ask no exceptional advantages for the Islands, but only that as a County they should be placed on an equal footing with other Counties as regards taxation; and that the total alienation of the proper government revenues of the Islands shall be, as far as possible, redressed, and part compensation granted.

Motive of the Scottish Misgovernment in the Islands.

26. If Scotland had from the first obtained complete and full possession of the Islands, it is probable that no serious harm would have resulted. But, as it was, Scotland's tenure was uncertain, so that, while on the one hand taking as much as possible out of the Islands in view of the possibility of their redemption, the Scottish government at the same time endeavoured to render that redemption more remote and impracticable, by instituting a course of under-hand usurpations and aggravation of native laws and customs, resulting in the grievances and oppression which we have already noted, and which largely continue to the present day.

The Isle of Man—a Comparison.

27. It is interesting to note in the kindred case of the Isle of Man, where the cession was complete, how differently that State has been treated; it still retains its ancient prerogatives, and is allowed favourable fiscal arrangements, although without having such a title to these privileges as that possessed by Orkney and Shetland.

Objections Answered.

28. *Prescription.*

(*a*). There has been only one effective argument put forward in the Law Courts in favour of a continuation of the present state of affairs in Orkney and Shetland, viz., prescription (according to Scottish Law). In that case the British Parliament alone remains to grant redress. And let it be remembered that these Islands from their past peculiar history have a special claim on the British Legislature to receive ample satisfaction for their wrongs; and moreover their violated rights are founded upon the International treaty of 1468, which remains unprescribed and imprescribable.

Double Land-Tax not now a Grievance.

(*b*.) Another objection raised is, that many of the present landowners, or their predecessors, have purchased their lands, including the double taxation, and paid correspondingly less value. Disregarding the special claim of Orkney and Shetland for justice and redress in this matter, it will be a sufficient answer to this objection to state that the mere fact of one county being doubly taxed (even supposing all the present owners received their lands for nothing) would be quite sufficient to weigh down that county, and retard its prosperity in comparison with others.

Earldom and Bishopric Crown Property.

(*c*.) It may be further objected that the Earldom and Bishopric were Crown property, and that the Crown has not exceeded its rights in the way it has dealt with these estates. In reply to this we may

remark that the Earldom and Bishopric, in 1653, consisted of fully two-fifths of the whole valuation of the free rents of the Islands, and were largely composed of lands confiscated by the Scottish governors and Bishops for trivial and trumped-up causes. The mere fact of the Crown property having been augmented in the above manner, and being of such an extent, ought to have been a sufficient reason for its being at least partially devoted to the public good of the Islands. The more so, when we remember that the government of the Islands had been almost entirely supported by the revenues of these estates for nearly nine centuries. But, we insist, it was *ultra vires* of the British Crown to alienate the public property of the Islands from its immemorial purpose, apart from all considerations of justice—notwithstanding that we consider the plea of justice alone sufficient to have prevented this. The Scottish Crown certainly acquired right (with the consent of the King of Norway) to the Earldom of Orkney and Shetland; but without any powers to alienate or to affect that estate, so far as it pertained to the government of the Islands. The acquisition of the Earldom was virtually the acquisition of the patronage of the executive government of the Islands, subject, as it was, to the local laws and customs,—which is amply borne out by subsequent events.

Special attention is again called to the fact that while the landowners have been permitted to deduct their Scottish teinds from the Norwegian teind duties paid to the Crown disponee, they have been denied a similar deduction of Scottish land-tax from their Norwegian land-tax or *skatt* duties.

Claim for Redress as a Scottish County.

29. But, apart from all their peculiar claims, the Islands are entitled in their capacity as a Scottish County to receive redress and compensation from the British Parliament for the great injustice which they have suffered in the past, and to which they are still subjected; the more so when their remote situation and other commercial disadvantages are taken into account, and the little aid ever received from past governments in comparison with the Scottish Counties. And let it be remembered that their public taxes, lands and revenues have been totally diverted from their immemorial use of supporting the government in the Islands, and applied to non-local purposes. Surely, it is urged, these Islands, even in their capacity as a Scottish County, have an unanswerable claim on the British Government for redress.

Your Memorialists would also submit, as a matter deserving some consideration at the present time, that throughout all these centuries of incessant injustice, the inhabitants of Orkney and Shetland have been true to the traditions of their law-abiding race, and have consistently confined themselves to Constitutional methods of seeking the redress of their wrongs.

Signed in name and by authority of the meeting,

J. G. MOODIE HEDDLE of Melsetter, Orkney, *President.*

ALFRED W. JOHNSTON, *Secretary,*

38, Beaumont Street, London, W.

APPENDIX.

SKATT.

THE Norwegian land-tax or *skatt*, in Orkney and Shetland, was assessed upon a system of valuation peculiar to these Islands, in the following manner :—All the cultivated lands, at the date of the valuation, were divided into districts of equal productive value, and consequently varying in extent in different localities according to the relative quality and productiveness of the soil. Each of these districts was then assessed with an annual payment of one ounce of pure silver as land-tax, or *skatt*, and on that account called an "ounceland" (*Orkn. urisland*). The average area of an ounceland was about 104 Scotch acres. Each ounceland was sub-divided into eighteen parts called pennylands. This valuation is still used in Orkney for the assessment of *skatt*.

A later valuation was made in Shetland, on the basis of the purchase value of the lands at the date of that valuation, giving effect to the altered value of the soil since the former valuation. This valuation was calculated in marks, of 13s. 4d. sterling each, and the lands were divided into corresponding districts called "marklands." By the new valuation it will be found that, on an average, the ounceland was valued at 72 marks. *Skatt* was then, and is still, assessed in Shetland on the marklands, as is also Scottish land-tax.

Skatt was not payable whenever, and so long as, the valued lands might be uncultivated. Lands brought under cultivation after the valuation paid no *skatt*, and were called "quoys." Those estates called "board-lands,"

which were liable to entertain the Earl when on circuit paid no *skatt*.

Skatt was partly paid in kind, and partly in money. The following is a list of the various *skatts* paid in Orkney:—

Butter-*skatt*, latterly paid in money and called *skatt*-silver;

Stent, paid in butter;

Malt-*skatt*;

Cost, a mixture of meal and malt;

Forcop, the salary of the Law-man, or Chief Judge, paid in money;

Wattle, paid in bere [a species of barley], &c.

The *skatts* paid in Shetland were:—

Butter, oil, wadmell (native cloth), and money, etc.;

Wattle;

Leanger, a war contribution;

Sheep and ox money, a tax imposed by the Stewart Earls.

All these various *skatts* in Orkney and Shetland are now usually taken together, and called *skatt* duties or feu duties, and are paid in money at the current prices of the various items.

In the Norwegian Earldoms, the Earls retained one-third of the *skatts* for their local government, the other two-thirds going to the Crown for the Imperial Government. But in the case of Orkney and Shetland, the Earls retained the whole *skatts*, in consideration that they had to carry out the defence of the Islands at their own cost.

III.—FOREIGN MARITIME LAWS: II. ITALY.

MERCANTILE MARINE CODE.

TITLE IV.

Maritime Laws in Time of War.

CHAPTER I.

Acts of War which may be exercised by Merchant Vessels.

ART. 207. No merchant vessel is allowed to attack an enemy, make a prize, search a vessel or exercise acts of war, except in the cases pointed out in the following Articles.

As a "counsel of perfection" this is in accordance with the Law of Nations generally; that is, that if the private vessel or person making a capture be himself captured by the enemy, he may be treated as a pirate. But in England, at all events in our great wars, anybody was deemed justified in *attacking* the enemy, but the captured property was a "Droit of Admiralty," and, as such, the office of Lord High Admiral being in commission, belongs to the Crown, in its office of Admiral, and has, when the captor was first attacked, been granted to the actual captors on their petition. See Twiss, *Law of Nations in Time of War*, Lond. 1875, §§ 190, 194; now the express law, § 39, Naval Prize Act, 1864.

And the right to recapture British property is quite independent of a commission or letter of marque: *The Helen*, 3 C. Rob. 228; *The Progress*, Edwards, 215; or the property of allies, *The San Bernardo*, 1 C. Rob. 178.

208. The fitting out of privateers is abolished; nevertheless, with the exception of the engagements agreed to by the State in the Convention of Paris of 16th April, 1856, the fitting out of privateers against a Power which has not entered into the Convention or which has withdrawn from it, may be allowed by way of reprisals against captures which have been made of vessels belonging to the National Mercantile Marine. (*a*.)

In this case the conditions on which Letters of Marque will be granted, and under which privateering will be carried out, will be determined by Royal decree. (*b*.)

On this head, if the Belligerent Power has not already given up the right to make prizes, those who fit out National vessels may, on request made to the Maritime authority, obtain leave to increase the arms, stores, and crews beyond their ordinary amount. (c.)

(a.) This seems a reading of the obligations of the Treaty of Paris not likely to be accepted by Great Britain. True, the signatories of the Treaty are debarred from using Privateers in warlike operations *inter se*, but can use them against other States quite independent of reprisals.

(b.) This is usual everywhere.

(c.) There is nothing to prevent a British vessel carrying what arms or crew she likes, unless she comes under suspicion of being engaged in the Slave Trade, or is fitted out in violation of the Foreign Enlistment Act, 33 & 34 Vict., c. 90.

209. Merchant vessels which are attacked by ships even of war may defend themselves, and make captures, as well as assist in the defence of other national ships or allies that are attacked, and assist them in making captures.

See Arts. 207 *ante*, and 220 *post*.

Probably no State would deny the right of self-defence. The Codes of most countries make special provision for wages and medical expenses to members of the crew who are injured in defending the ships, B. 58, F. 263, as amended in 1885, G. 49 (1872), H. 424—427, I. 537—539, N. 32, P. 1468—1472, R. 967—992, S. 644—645; but of these the German, Portugese, and Russian Codes alone expressly recognise the right to compensation or a payment in the nature of salvage as well. The Russian Code lays down the duty of defending the ship, and by §§ 1043 to 1056, whilst not allowing merchant vessels to attack even an enemy, makes special arrangements for mutual agreements for defence and for prize salvage in case the attacking vessel is captured,

210. If an enemy's ship attempts to make a capture in sight of the shore of the State, then, over and above the steps taken by the military forces to repel the attempt, it shall be lawful for any citizen to fit out armaments to go to the assistance of the vessel attacked.

If the ship which is attacked is saved, these persons have as prize money a share of the property salved, which is determined, if the parties cannot agree, by the proper Maritime Authority.

The first clause of this article appears to be a necessary corollary to the

universal right of defence recognised by the preceding article, but it would also appear to recognise the right of any private individual on shore to wage war against invaders.

As to the latter clause, see note to Art. 208, *ante*.

CHAPTER II.

Of Captures made by Ships of War.

211. The capture and making prize of the enemy's merchant vessels by ships of war belonging to the State will be abolished by way of reciprocity towards any Power which adopts similar treatment in favour of merchant vessels.

This reciprocal treatment may result from Municipal Law, Diplomatic Conventions, or declarations made by the enemy on the first outbreak of war.

That all nations should adopt this rule, and that private property at sea should be treated just as it theoretically is treated on shore has long been a dream of States possessing much commerce but insufficient means of defending it, but is not likely to be generally adopted so long as some nations are more powerful at sea than others. Even if adopted, such a rule would probably soon become ineffective, as those States powerful at sea would declare a blockade of the enemy's coast, or extend the doctrine of contraband, and so destroy the trade not only of the belligerent but of neutrals, as witness the case of the rice ships in the recent Franco-Chinese war. It is, however, fair to say that it was observed in the war between Italy and Austria in 1866.—See Lushington, *Naval Prize Laws*, p. ix.

212. The capture and confiscation of contraband of war are excluded from the operation of the previous article, and in this case ships which commit a breach will be treated similarly to neutral vessels which commit a breach of neutrality.

Capture and confiscation for breach of a blockade which is effective and declared, are also excluded from the operation of the above Article.

See note to last Article.

213. The rules to be followed by the commanders of vessels which take prizes will be laid down by a Royal decree, or by the order of the commander-in-chief of a

fleet, squadron, or naval division, when the regular instruction cannot be received in time.

It has been usual in Great Britain to issue a Prize Proclamation at the commencement of a war, but now the Naval Prize Act, 1864 (27 & 28 Vict., c. xxv), and the Prize Proclamation of 1866 govern the matter.

CHAPTER III.

Of the Treatment of Ships and Merchandise belonging to Neutrals.

214. Whenever an enemy's ship is captured, if there is in its cargo merchandise which is the property of a neutral, this must be carried to the place into which the prize is carried, and then placed at the disposal of its owner, unless it has to be treated as of the nature of contraband, or the ship has been surprised in the act of breaking a blockade.

This is practically Article 3 of the Declaration of Paris, and is, in fact, the general Prize Law of England, derived from the Rules of Oléron and the Consolado del Mar, that the character of the ship did not infect the goods, contrary, on this point, to that of both France and Holland at different times, under the varying pressure of war and interests of neutrality.

215. Neutral vessels laden in whole or in part with things of the nature of contraband of war, and going to the country of an enemy, will be captured and brought into a port of the State, where the ship and contraband merchandise will be confiscated, and the other goods left at the disposal of the owner.

The general law of Prize on this point appears to be very doubtful. If there is a Treaty existing between the capturing belligerent and the neutral not to carry contraband of war, then the captured vessel would be good prize, otherwise, as there is nothing *malum in se* in carrying contraband, it would appear not to be so, but if the ship and innocent goods belong to the same person as the contraband goods, they would share the same condemnation. In ancient times it would appear that contraband was not confiscated, but pre-empted by the captures (see French Ordinance of 1584, Art. 69). False or fraudulent papers, or a fictitious destination, involve the ship in the fate of the contraband cargo; it therefore appears that the Italian law is stricter as to the ships and more lenient as to other contraband cargo, than the ordinary law of Prize.

A question will no doubt arise in the first great Naval War, whether, as by the Treaty of Paris, the neutral flag covers enemy's goods, such goods, in themselves innocent, are still free when the neutral ship herself is confiscated by reason of other contraband goods on board, or for other reasons.

216. Unless otherwise agreed by Treaties or special declarations made at the commencement of hostilities, the following articles are declared to be contraband of war:—Cannons, muskets, carbines, revolvers, pistols, swords, as well as other firearms, whether such as can be carried, or of any other description, munitions of war, military implements of all descriptions, and generally all things which, without manufacture, can be at once used for fitting out naval or military forces.

This is a much more limited definition of "contraband" than that recognised in England, as in this country are included ordinary provisions when bound to a naval port, the latter a limitation very difficult to make now, with the improved internal means of communication. Also, we include in the category of contraband, public officials or servants of the belligerent, except Ambassadors, enemy's despatches, except those to an Ambassador in a Neutral State, and ships going to be employed in the military or naval services of the enemy, and in the recent Franco-Chinese war the French claimed to extend it to rice going to the Northern Ports of China which were not arsenals. Seeing how large a proportion of our food supply is imported, it would appear to be very strongly the interest of Great Britain to resist this extension.

217. Ships under a neutral flag taken in the act of breaking a blockade, which is effective, and has been duly announced, will be captured and confiscated with the goods which are laden on board them.

So here: *The Panaghia Rhomba*, 12 Moore P.C. 168; indeed both Great Britain and the United States consider a vessel bound to a blockaded port as breaking the blockade. Phillimore, *International Law*, Vol. III., §§ 304, 308.

218. Neutral vessels under the convoy of ships of war will be free from any (right of) visit. The declaration of the commander of the man-of-war will suffice to authenticate the flag and the [nature of the] cargo of the ships in the convoy.

Not so here: *The Maria*, 1 C. Rob. 343, *The Elsebe*, 5 C. Rob. 176. Indeed, any resistance to right of search, even on the part of the convoying ships, justifies detention of the whole convoy.

CHAPTER IV.

Of Recaptures, Legalisation of Captures, Confiscations, and of the Judicial Proceedings relative thereto.

219. Whenever a merchant or national ship is captured by the enemy, and is recaptured by a privateer, it will be restored to the owner, he paying one-fifth of the value of the things recaptured if the prize has been for 24 hours in the hands of the enemy, and one-tenth if the recapture has taken place within the first 24 hours.

If a ship captured by the enemy has been carried into their ports, the regulations established for other prizes made from the enemy are to be followed. If a merchant vessel, whether national or belonging to allies, has been captured by the enemy, and is recaptured by a man-of-war, she will in all cases be restored to her owners without any salvage.

For the differing practice of different States on this point see Twiss, *Law of Nations (War)*, 345.

In England prize salvage to ships of war is one-eighth, and in special cases up to one-fourth of the value of the prize (Naval Prize Act, 1864, § 40), and probably would be the same by Proclamation in the case of privateers, if letters of marque were issued. The 24 hours possession by the enemy has been generally recognised as divesting the original owner of his title, that is, that the capture is consummated by 24 hours possession, but the rule is not in the the present Prize Act.

220. If a prize that has been made by the enemy be recaptured by the captured crew, they cannot demand anything beyond a bounty at the discretion of the Prize Commission, to which Article 225 refers.

See note to Article 208. They have in this country a *locus standi* in Court, and will be liberally rewarded; *The Two Friends*, 1 C. Rob. 271; *The Beaver*, 3 C. Rob. 292.

221. Merchant ships, both native and foreign, freighted on account of the Government, which are recaptured by a man-of-war after they have fallen into the hands of the enemy, will be restored to the owner, and he will not be bound to pay any salvage.

If the vessel (so) freighted be retaken by a national merchant ship, there shall be due to the latter a salvage chargeable on the national Treasury equal to one-fourth or or to one-sixth respectively, of the value of the things recaptured, according to the different cases provided for in the first part of Article 219.

It would appear very doubtful, on principle, whether any legal claim for salvage of Government property could be supported in Great Britain; whilst the 24 hours rule was in force, before that period had elapsed the property still remained in the Crown, and, after it had elapsed, the property would vest in the recaptors on behalf of the Crown; but it was decided in *The Betsy*, Hay and Marriott, p. 80, that Government property recaptured by a King's ship was liable for salvage, and it would appear to be *à fortiori* the case if the recapture were made by other persons. The first of these clauses disentitles the crew of a ship of war *altogether* to salvage in such a case.

222. If a ship which is captured by the enemy and subsequently abandoned, whether in consequence of stress of weather or other accident, comes into the power of (Italian) subjects, it will be restored to the owner, on payment to the salvor of the salvage expenses and of the salvage reward decreed by Art. 134. The regulations of Articles 130, 131, 132, and 133 will be observed in reference to the salvage operations, the declaration and sale of the things salved, the publication of advertisements, and the time during which claims by any person as owner or otherwise may be preferred, and for the giving up and appropriation where no claims are made to such goods.

In Great Britain the law is that the case is treated not as one of derelict, as the owner has not voluntarily abandoned; nor as a case of military salvage, as there is no adverse possession; but as an ordinary case of civil salvage, the amount awarded being always discretionary, and not so limited as by Italian law, and this seems to be the old law of the Consolado del Mar and of the French Ordinances of 1681. See Phillimore, *International Law*, Vol. III., 409, 424. Wheaton, *Mar. Capture*, Ch. viii., §§ 25, 26. The case, however, is different if the vessel comes into the hands of neutrals, for they admit the title of the captor, and therefore restore to him on payment of salvage. Phillimore, Vol. III., 425. Wheaton, *Mar. Capt.*, Ch. viii., § 26. *The Mary Ford*, 3 Dallas, 188.

223. As soon as a vessel which has been made prize of or captured has arrived in port, the commander of the vessel making the prize or capture must make a detailed declaration of what has happened to the Maritime Authority, and deposit with the same Authority the papers relating to the prize or capture.

If the vessel making the prize or capture be a man-of-war, the commander will send his papers, with the report relating to the affair, direct to his superior officer, without the delay of forwarding it through the Maritime Authority.

Detailed instructions to captors as to their duties on bringing prize vessels into Port are given in the Naval Prize Act, 1864 (27 & 28 Vict., c. 25), §§ 16 and 37, and penalties for breach of duty in this respect are laid down in the Naval Discipline Act, 1866 (29 & 30 Vict., c. 109), §§ 38—42.

224. Where the vessel made prize of or captured is recovered in a foreign port the depositions and papers will be forwarded to the Consular official, who will discharge all the duties in regard to prizes which are entrusted to the Maritime Authority.

This can only apply in the case of an ally, as the vessel could not legitimately be recaptured in a neutral port.

225. Legal proceedings in regard to the lawfulness of a prize and for the condemnation of it will be carried on before a special Commission, instituted by Royal decree, according to rules prescribed by its orders.

The Prize Jurisdiction of the British Empire was vested by the Naval Prize Act, 1864, §§ 3, 4, 5, in the High Court of Admiralty, and all Courts of Admiralty and Vice-Admiralty, with an Appeal to the Judicial Committee of the Privy Council. The Appellate Jurisdiction Act, 1876, § 23, specially provides for the continuation of the functions of Vice-Admiralty Courts. But there is at present considerable doubt as to the Prize Jurisdiction of what was the High Court of Admiralty, whether it is vested in the Probate, Divorce, and Admiralty Division or not, and whether the appeal lies to the Judicial Committee or to the Court of Appeal.

226. Whilst proceedings to establish the legality of the prize and for its condemnation are pending, the Maritime Authority, checked by the capturer and captured, or their

representatives, and by a person appointed by the Customs, will proceed to make an inventory of the whole of the cargo and other things on board the ship which is made prize of or captured, and will make provision for their safety, or, if they cannot be preserved, for their public sale.

The British Regulations on this head are contained in the Naval Prize Act, 1864, §§ 24—29, 31.

227. These proceedings to declare a prize lawful do not apply to vessels of war which are captured, but this case will be at the sole determination of the Minister of Marine.

Whenever the prizes referred to in this Article are made by privateers or merchantmen, these will receive as prize money a sum equal to one-fifth value of the captured vessel less her arms and munitions.

The captor has, in addition, a right to be repaid for the damages he has sustained in making the capture.

Cf. Naval Prize Act, 1864, §§ 22, 42. Apparently the case of a man-of-war being captured by a merchant vessel is not contemplated by this statute, but prize bounty for the capture of a man-of-war is, if allowed at all by Royal Proclamation, to be a function not of the value of the ship but of the number of the crew, *i.e.*, £5 per head for each member of the enemy's crew on board at the commencement of the engagement. Having regard to the enormous increase in size and value of ships of war of late years, and the decrease in the number of the crews of the large vessels, the Italian scheme seems, now at all events, far the most advantageous to the captors.

F. W. RAIKES.

IV.—THE NEW RULES UNDER THE LAND TRANSFER ACT, 1875.

THESE Rules are few in number and modest in diction, but they are calculated, we think, to be the harbinger of a peaceful revolution which may be of the highest importance to the Community. Everyone knows what a sad stagnation has taken place in the land-market during the depression of the last few years, and many thoughtful minds have grieved in advance over the wide-spread misery which may follow if it continues. If the secret of enabling people to buy and sell land cheaply and easily be once discovered, a great deal of the apprehended danger may be averted, because the moneys which are now mis-spent in extravagant costs will be retained by buyer or seller as the case may be, so that the drawbacks which now attend transactions in land will be much diminished. In such a state of things, it may be presumed, the wealthy and the moderately rich will deal in landed estates more frequently, while the man of small means, who now holds aloof altogether, will also, it may be hoped, venture into the market, and thus a briskness will be created both as to large and as to small sales and purchases which may do much to carry us through the present Economical crisis. Such a change the new Rules of January 1, 1889, which came into operation on February 1 (they will be found in the *Weekly Notes*, 1889, p. 27), may, we think, do much to bring about. The first three Rules give short, easy, and practical directions as to the mode of making applications, the documents that should accompany them, and the like; with these directions to guide them, people need no longer say, "I can't manage the business myself, for I don't know how to set about it;" they need not even say, "I can't

afford to employ a lawyer." Rule 4 sanctions certain Forms of Transfer; the actual Forms, which are given in the Schedule, are not a whit more complicated than the ordinary transfers of shares to which we are all accustomed. Rule 5 says where and before whom the applicant is to make any oaths and verifications that may be necessary. We think the list, "Magistrate, Commissioner for oaths, practising solicitor, banker," might with advantage be enlarged by the addition of "beneficed clergyman, manager of a bank," and possibly one or two more. Rule 6 relates to maps, and seems to be framed in such a manner as to obviate any possibility of doubt as to the dimensions and locality of the land dealt with. There will be an "index" map in the Registry, so that a buyer will never have to depend, as often happens in the case of unregistered land, on a loose and possibly obsolete description in a deed. Rule 7 consists of miscellaneous details; we would suggest that the part as to searches and inspection should be amended so as to throw open the Registry, for those purposes, to everybody, as in the case of Wills at the Probate Office. Rule 8 relates to Solicitors' costs. The Act of 1875 and the original Rules under it have merits, but the latter are wordy, long, and cumbrous; the terse directions in the new Rules, which in part repeal and in part supplement them, will, we trust, have the effect of converting the Act into a practical measure.

Thus, even if no fresh surprise had occurred since January 1, the public would, apparently, have reason to congratulate itself; but much, very much, has been done since. In the *Weekly Notes*, 1889, p. 69, will be found a "Note" issued from the Land Registry Office, containing a Comparative Table of Fees drawn up so as to shew, in a striking manner, the saving effected by transacting business personally at the Land Registry instead of doing it

through the medium of a professional man. Tabular matter generally has the merit of clearness, but we suspect that our readers may not care for it, so we shall only give a brief synopsis of results. The Table in question supposes, in its first column, that estates of various values, from £50 to £100,000, are sold, &c., and states in other columns the comparative cost of each transaction: firstly, when a man conducts the business personally in the Registry; secondly, when he employs a solicitor to conduct it there; thirdly, when the land is unregistered and a solicitor is employed. About twenty different values, perhaps, are tabulated; but of these we shall only give five, and we shall in other ways aim as much as possible at brevity as well as perspicuity. Supposing the value to be £50, the Registry Office fee for a personal applicant is 5*s*., and this, in such case, is the whole expense incurred; if a solicitor is employed, his costs, added to the fee of 5*s*. (which the applicant still has to pay), come to £2 7*s*.; if the land is not registered, there is of course no Registry Office fee, but the buyer and seller, between them, have to pay £6 to the solicitor, or solicitors. After this detailed explanation as to a £50 transaction, we may deal with the higher values more briefly, by stating the costs respectively in the first, second, and third cases, which will be understood to mean the several modes, just described, of transacting the business:—

Value £500: 1st case, £2; 2nd case, £6 4*s*.; 3rd case, £15.

Value £5,000: 1st case, £10; 2nd case, £20 10*s*.; 3rd case, £90.

Value £50,000: 1st case, £39; 2nd case, £75; 3rd case, £340.

Value £100,000: 1st case, £64; 2nd case, £127; 3rd case, £590.

It must be remembered that, in the third case, although the costs do not all fall on the same person, they are a

burden on the same land; and this is the point that has to be principally considered when we are looking at the matter with an eye to the public advantage. Striking as are the contrasts presented by this Table, the enhancement of expense caused by employing a professional man would really make the difference much wider in most cases; for Counsel and fees might have to be added, besides a large amount of "attendances," letters, &c., which would be outside the work covered by the "scale" payment. We have little doubt that the professional expenses actually incurred would frequently amount to double the sum shewn in the Table, while even in the most favourable cases there would be almost always an addition of appreciable amount. The "Note" tells us that the Registry Office fees now charged, though higher than before, "are fixed at about one-fifth of the scale of costs which a solicitor is authorised to charge for conveyancing with unregistered land;" but the addition to which we have alluded above would, of course, make the gulf much broader whenever it occurred.

It may be asked, however, what advantage can the public derive under the new Rules, when the Registry Office fees are actually made higher than before? We answer that these fees are still surprisingly moderate, and that nobody need grumble at their amount; still, we do not pretend that the raising of the fees is in itself an attraction; it may, indeed, tend to make registration a feasible experiment by helping to keep the office going; but buyers and sellers will not, perhaps, think much about that. The real attraction to the public lies principally in the "Note," which, as we have explained, sets forth the actual statistics of the various kinds of expenditure and shews how much may be saved by doing the work without professional aid. We once saw a vast reservoir made to supply a populous town, but as yet without a drop of water in it, and of no use to anybody. When, as the town-clock struck a certain fixed

hour, a single hand turned a little wheel, the crystal fluid quickly flowed in, and that which had been a bare aggregate of four walls was converted into a fountain of life for the neighbouring community. So may the new Rules and "Note," slight as they seem in themselves, give new life to far more powerful energies which have lain dormant for want of being sufficiently known. It was never, we believe, really necessary to employ professional assistance for the general working of the Act, but it is now quite certain that it is not necessary, and it is known how much may be saved by making and carrying through the applications without it. We may add that, hitherto, it seems to have been necessary to go to a solicitor for "verification" (under the old Rule 46), which circumstance may, perhaps, have created an impression that a solicitor must be employed throughout. Such an impression, whether right or wrong in the past, can have no place whatever in the future. A solicitor, writing to one of our weekly contemporaries, complains that the new Rules will deprive himself and his professional brethren of practice which they have a right to expect, and goes the length of asking if they will have compensation. Compensation for persons who are still allowed to make five times as much by a certain kind of work as the same work will cost without them! When the Act of 1875 was new, a solicitor deprecated its use on the ground that if land were registered the owner would find a difficulty in borrowing money upon it, because it would not be worth a solicitor's while to find a lender, the probable costs of transacting the business being much reduced. It never occurred to this legal Cassandra that A., the borrower, and B., a willing lender, might possibly come together without any intervening solicitor. Truly, there are some people who think that the law is made for lawyers, and not lawyers for the law! If the new Rules do anything towards dissipating that idea,

they will help to work a very useful reform. In connection with this we may mention two very important assurances contained in the "Note," one that a person selling land by the medium of the Registry will hardly ever require a solicitor, while most purchasers of average business capacity will also be able to do without one; the other, that where registered land is sold or mortgaged as a whole, the transaction may be completed by the parties themselves in a quarter of an hour. The knowledge of these things ought largely to increase the business of the Registry; but in order to disseminate that knowledge widely, some means should be found of spreading it beyond the comparatively limited circle to which the purely Legal periodicals in the main appeal. The question how to do this may not improbably be answered by the same common sense which suggested the framing and promulgation of the new Rules and "Note." It must be admitted, we think, that the problem how to create a desire for profiting by a cheapened and otherwise facilitated method of Land Transfer is Economical, rather than Juridical. Still, in so far as the simplification of unnecessarily complicated modes of Transfer has been an obstacle to dealings in Land, we are glad to be able to welcome in the new Rules an important advance in the right direction.

Quarterly Notes.

The International Copyright Congress at Venice.

Congresses come and Congresses go, but the question of International Copyright seems to go on for ever. Always under discussion, never really settled, it still awaits solution in a perhaps still distant Future. Every fresh discussion, however, brings us a step nearer the goal, though it may also shew us how many obstacles have yet to be surmounted.

The Venice Congress of the International Literary and Artistic Association affords a good sample of this twofold character of the Copyright question. (*Revue Libre*. Paris. No. 120-121, for Aug. and Sept., 1888. '*Un Congrès Littéraire à Venise*. Par A. M. OCAMPO. Paris. [1888.] Libr. Soudier.) The debates were fairly long and full: the debaters represented a goodly variety of countries: yet we find in the Resolutions adopted some points which are in direct conflict with the present necessities of our own country in the matter of Musical Copyright, and thus we are brought, *pro tanto*, to what would seem a partial deadlock rather than a progress achieved. It may be, however, that either the consideration of the Resolutions passed at Venice shall convince us that we should do best by adopting the views of the Congress, on the point just indicated, or further consideration in the light of our own present needs, shall convince the Association that a future Congress ought rather to accept our views.

At the present moment great confusion reigns in this country, and great difficulties are constantly created, as we believe quite unnecessarily, by the absence of any possibility of the public generally being aware whether the author of

a particular musical composition has or has not reserved the right of public execution. Thus it might have been the case that a Prince of the Blood should have been open to the imposition of a fine, shared between the holder of this right and the informer, for singing the "Sands of Dee" at a public Penny Reading or Concert. It might have been well for those who see the injustice of the present chaotic condition of the Law on Copyright generally in this country, if Prince Leopold himself, the then President of the Royal Society of Literature, had indeed so laid himself open in all innocence. On the principle that it takes the loss of a few Directors through a Railway accident to get some glaring defect remedied by a Railway Company, the fact of a Royal Duke being fair game for the Informer would probably have had a salutary effect upon the minds of our Legislators. But the Informer has not yet flown at such a high quarry, and therefore we have still to possess our souls in such patience as we may, pending the day of better things.

On the grounds stated above, we are necessarily obliged to dissent, as regards the United Kingdom, from that portion of the Resolutions of the Venice Congress which affirms that "the obligation imposed by the Convention of Berne, Arts. 7 and 9, on the authors of . . . published musical compositions to declare on the title-page, and at the commencement of the work, their intention to forbid its public execution, is incompatible with the right of property vested in the author." We feel bound to say that what is wanted, in this country at least, for the protection of the public, seems to us to be just the carrying out of the Berne Articles under the sanction of Municipal Law. We want people to be able to know whether the author does forbid such public execution, in order that application may, if required, be made to the author, through his publisher, for a permission *ad hoc*. As the object for which it would

be sought is usually a charitable one, we may assume that the permission would not often be refused. At any rate, the position could not be worse than it now is, and almost any change in the existing Law, or rather chaos, would probably be for the better. We are not sure, however, whether we rightly understand the wording of the Venice Resolution. We suppose that the "author" mentioned therein is the author either of the song, that is, of the words, or of the music to which the song has been set. What we fail to see is how the necessity for such author publicly stating that he forbids the public rendering of his words or his music constitutes an infringement of the "right of property vested in (*appartenant à*) the author." This may be owing to our British density of intellect. Anyhow, we do not profess to be quite clear as to what the Venice Congress really meant by the Resolution which we have been criticising. Perhaps, if the next Congress of the Association should continue the discussion of this branch of the subject, it may take the state of the Law in the United Kingdom into consideration, as the Venice Congress probably did not,—though British members of the Association were present, we believe,—and give us the benefit of an amended reading of the Venice Resolution, in the light of the state of things which is produced by the absence of any requirement for the public declaration of reservation of the right of public execution in the case of Musical works. For this must be, we apprehend, the real gist of the matter. Forbidding the public execution can only, it appears to us, mean the reservation of the right of public execution by the author. He is surely entitled to reserve this, but the public are equally entitled to know that he reserves it. Otherwise we reach Chaos. While on the subject of Musical Copyright we may note that the Venice Congress, as a matter of practical detail, recognising that music ought to preserve the character of a universal language, so

as to be understood by all nations, expressed the desire that "the *formulæ*, the shades of tone (*nuances*), and the movements be indicated in Italian on the musical compositions of all countries." On this point, at least, the Venice Congress was no doubt in harmony with local feeling.

A more important question was dealt with when the Congress came to discuss "Representation," and it was resolved that "the cession of the right of publishing a musical or dramatic composition does not carry to the publisher (*au profit de l'éditeur*) the right of execution or representation of the work. This right continues to vest in the author." Unless otherwise agreed between author and publisher, we presume; *i.e.*, there must be a separate convention as to this further right. But we have seen that the Venice Congress considered it an encroachment on the author's right that he should be bound, as in terms of the Berne Convention, to notify to the public the fact of his cession or retention of the right of representation or execution. In the absence, therefore, of any notification on the title-page, or at the head of the play or musical composition, to the effect that it may be represented or executed, the language used by the Venice Congress would lead us to the conclusion that such representation or execution would be illegal. This presumption of illegality seems to us harsh, to say the least of it, as well as full of practical inconvenience. For, as far as we can see, musical education would become a work fraught with danger to masters and governesses. It would be "execution," we presume, if a child strummed through a piece, under the patient "one, two, three," of a long-suffering Daily Governess. From the author's point of view it would probably also be "murder," but still, music has to be taught, somehow, and not all of us are born musical geniuses. This appears to us quite as practical a difficulty and quite as full of hardship as the other case, already discussed, of the so-called rendering

of Copyright songs at Penny Readings, and other like entertainments. We say so-called rendering of Copyright songs, not because we doubt that fact of the reservation of the right of execution in the several cases as they may have arisen, but because we believe the *animus furandi* to be in all such cases non-existent, and because we consider the real fraud to be committed on the necessarily ignorant public, from whom the fact of the reservation is carefully concealed, and not upon the owner of that portion of the Copyright who so conceals his ownership.

It will be seen that we are obliged to dissent from much of the doctrine of Copyright formulated at the Venice Congress; but we dissent in the truer interests, as we believe, alike of Copyright and of Literature and Art.

Besides the Official text of the Resolutions, printed as an official communication from the International Literary and Artistic Association in the number for August-September last of the *Revue Libre*, a new series of *La Jeune France*, we have also been favoured by one of the Secretaries of the Association, M. Ocampo, a countryman of Cervantes, we believe, with an account of the Venice Congress contributed by him to the *Revue Générale*, and now reprinted in pamphlet form. M. Ocampo does full justice to the social side of the gathering, without neglecting its graver aspects. That social side itself, however, was full of historic interest, as it could not fail to be when a Count Tiepolo, Syndic of Venice, was the *cicerone* of the Association as they halted to admire the frescoes of a long bygone Tiepolo on the walls of the Palazzo of Mira on the Brenta, where Henry III. of France was entertained most sumptuously, in the name of the Republic, by Federigo Contarini, Procurator of St. Mark.

In their excursions to Torcello and Murano and Burano, the Association were treading amid the relics of a great Past, and of wonderful olden industries in mosaic and glass

and lace, putting forth fresh shoots, promising a renewal of some at least of these glories, under the impulse of the new life making itself felt throughout Italy. The lace-making industry of Burano had dwindled down till the knowledge of the delicate craft remained in 1872 with a single old woman, when the patriotic energy of the Countess Marcello and the Princess Giovanelli placed that old woman at the head of a School of Lacework which is at the same time a School of Art, where something like a hundred and fifty Burano girls earn an average of six francs a week, rising in individual cases to be nearly four francs a day, by the wonders which their fingers bring forth. Burano was all *in festa* to welcome the Association, and M. Ocampo was greatly struck by the warmth and the universality of the welcome accorded by the good islanders, a welcome warmer than that of many a town, and evidently sincere.

What, asks M. Ocampo, can the poor fisher folk of Burano have known of the depth and the breadth of the Thought of Man? We cannot tell him. Only it is clear that at least the Burano people thought that the Members of the Congress could appreciate alike their Lace work and their warm welcome, and they felt, no doubt, that they were themselves sons and daughters of St. Mark, and that it was their duty to receive the guests of St. Mark with a hospitality worthy of the palmiest days of the Republic, and far more free from any notions of ulterior benefit. With all this gaiety and hearty reception, one sad thought still presents itself to M. Ocampo's mind as he tells of the Venice Congress "*en Séance*" and "*en Gondole.*" Here, as everywhere else, he says, we are met, as a Congress, by the warning, "Do not talk Politics." Well, of course, he continues, we do not want to talk Politics: we only want Justice for Justice, without any reservations. But wherever we go—and this remark of M. Ocampo is only too painfully true—we see nations with their swords sheathed, it is true,

but with their hands on those swords and ready to draw them at a moment's notice. Too true: the nations of the earth are full of distrust for each other, and their swords are all too ready to fly from the scabbard at any moment. From this point of view the teachings of the Congresses of the International Literary and Artistic Association are indeed full of sad teaching. But it is something that the Association should itself go to and fro among the Nations on a mission of Peace and Justice and Civilisation. It is something that in the midst of the invention of deadly and yet deadlier engines of war, there should be a body of men going from country to country, avowedly knowing nothing of Party strifes and National jealousies, and seeking only how to protect the author's right to the creation of his brain, and how to spread abroad the best thoughts of the best men in the interests of Justice and of Civilisation. From this point of view the Congress of the Association are full of teachings of Hope.

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The Year Books.

In the Readings delivered before the Hon. Society of the Inner Temple by Sir Patrick Colquhoun, LL.D., Q.C., as Reader for 1887, and since published (*Lectures delivered in his Reader's Year.* By SIR PATRICK COLQUHOUN, Q.C., LL.D., M.A. Tinkler and Hillhouse. 1888), the learned Reader devoted the space of one entire Reading to the subject of the Year Books. It was much to give no doubt, in days when the "Black letter" type of Lawyer, whom Sir Patrick considered a necessity for the understanding of this ancient Legal literature, is so rare among us.

That the Year Books, which, with the *Rot. Cur. Reg.*, edited by Sir Francis Palgrave, constitute the oldest consecutive records of the Case Law of England, ought to be printed with all the helps to their right under-

standing which modern knowledge can afford, is laid down as an axiom by the learned Reader, and we are glad to find it so laid down. The labour involved in the carrying out of this really necessary work is, however, unquestionably very great; and, indeed, so great that Sir Patrick thinks it could only be accomplished either by a public body (is the learned Reader thinking of the Inns of Court ?) or by Government. To a certain extent, Government aid is already pledged to the undertaking, though not necessarily, as far as we know, to the full extent desirable. What has down to the present time been done in the way of bringing out careful and scholarly editions of the Year Books, under the direction of the Master of the Rolls, is fully acknowledged by Sir Patrick, who recognises the value of the work commenced by the late Mr. A. J. Horwood, and now carried on by his former fellow-labourer, Mr. Luke Owen Pike, M.A., of Lincoln's Inn and of the Record Office, one of whose last issues is before us (*Year Books*, 13 & 14 Edw. III. Edited under the direction of the Master of the Rolls. By L. OWEN PIKE, M.A. Longmans. 1886). But a great deal remains to be done, and some definite plan ought to be drawn up for its doing. If the Master of the Rolls could see his way to authorising Mr. Pike to bring out a volume at least annually, with perhaps in some years a supplementary volume of Glossarial or other relative matter, much would be secured, and there would be the benefit of keeping up the stream of traditional knowledge derived from Mr. Pike's long personal labour in the field, and his association with Mr. Horwood. What would be a good thing to do, however, and what the Master of the Rolls himself would probably so recognise, is one thing, and what funds could be extracted for it from the Treasury is quite another thing. Our Departmental economies do not seem to be happily conceived in the interests of legal and historical literature. We have known

of more than one valuable instalment of the issues which scholars are looking for, on the faith of a Government Department, hopelessly blocked by misapplied economies —cheeseparing would probably be a more descriptive though a less euphonious epithet. We can therefore only indicate what an opening there is for serious contributions to the History of English Law, and leave it to the Master of the Rolls to overcome what he can of the parsimonious attitude of the Treasury, and to the Selden Society, or any other Society of like aims, to fill up the gaps. Doubtless, men equipped for the task are not to be found at every corner; but they exist, and we quite believe, with Sir Patrick Colquhoun, that if the work be seriously taken in hand, the men will not be wanting. The work itself, though undoubtedly hard, is not without points of amusement as well as interest. The very colloquial style of the intercourse between Bench and Bar lends life to the scene. We seem to hear the suggestions *obiter*, made by Sharshull and Aldeburgh, and others of the Judges of Mediæval England, whose names have become familiar to the student through the labours of Mr. L. Owen Pike. The frequent, we might say constant, recurrence of the same names of Counsel in the Year Books, and their subsequent recurrence on the Bench, seem to shew that business was then, as now, the practical monopoly of the fortunate few, who mostly made their way to the Bench, while the less fortunate members of the Bar perhaps then, as now, became Reporters, and noted down the arguments of their more favoured brethren and the decisions and *dicta* of the Judges. The National importance of such an undertaking as the publication in full of the Year Books seems obvious, and for this reason we should be glad if its direction, while in progress, remained in the hands of those who have already done so much towards it. The chief difficulty connected with its completion under the direction of the Master of

the Rolls would appear to be the Financial obstacles opposed by the too constantly repeated *Non Possumus* of the Treasury, a *Non Possumus* which, in point of fact, is equivalent to *Non Volumus*. It is at best a hard struggle to get the allowances necessary for a piece of mere literary work out of a Government Department responsible for the allocation of funds. But to get that Department to go on allowing expenditure for transcribing and editing volumes which can scarcely be expected to have a remunerative sale, is harder still. The Chronicle Histories of England, from the Creation of the World to the Middle Ages, have no doubt a better chance, both of funds and of remunerative sale, or rather perhaps their chance of funds is greater than that of the Year Books in proportion to their greater probability of sales. Thus, we have seen Pipe Rolls, which were taken up years ago by the Government, in the days when Sir Francis Palgrave, Kemble, and other distinguished Masters of Historical and Legal Record reading, were to a certain extent a power in the land, have been long since laid on the shelf, only to be again brought to the front through the exertions of private individuals, who have formed themselves into a "Pipe Roll Society." We are glad to know that private enterprise is coming forward to carry on the unfinished work of olden Royal Commissions, but we none the less regret that the work should have been so long left dormant, and that it should be taken up afresh only when the master minds who planned and commenced the original publication as part of a consistent scheme of well-thought-out Historical Record publications have long passed away. The Leaders of Historical writing in the England of the present generation are, as a rule, not Record readers like Palgrave and Kemble. Indeed, they are in some notable cases *ex professo* the very reverse. Bishop Stubbs and Mr. Thorold Rogers are, we believe, two of the most brilliant exceptions to

this rule. So far, it is to be feared, both Record reading and Historical research are the sufferers. The greater, therefore, is the need for supporting those who still remain among us able to do good work in both branches. Mr. Pike has shewn himself to be both a skilled Record reader in his editions of the *Year Books*, and an able Historian in his *History of Crime*. We shall be glad if any words of ours should have the effect of strengthening his hands for the continuance of his good work, and with him the hands of all who may devote themselves to such laborious but important and valuable publications as the *Pleas of the Crown*, the *Pipe Rolls*, and the *Year Books* of Mediæval England.

Reviews.

London Marriage Licenses, 1521—1869. Edited by JOSEPH FOSTER. Quaritch. 1887.

The late Colonel Chester, D.C.L., Oxon., LL.D., Columbia Coll., N.Y., an American citizen who spent all the latter part of his life in this country, honoured alike by English and American universities, for his untiring researches into the English sources for American Genealogy, devoted immense labour to the transcription of the various sets of Marriage Licenses which issued from the offices of the Vicar-General, the Bishop of London, and the Master of the Faculties, and which are distinguished in this work by the several initials V., B., F. These Licenses, as Colonel Chester took care to point out, commenced at a period more than thirty years further back than the earliest of Parish Registers, and have, therefore, a special value in genealogical investigations. They are, of course, not evidence in themselves that the marriage for which the License was obtained actually took place, but they afford strong presumptive ground for the supposition, which, in most cases, would be substantiated by the Register of the Parish, or of one of the Parishes, indicated. They are thus material of great value to all who are engaged in genealogical investigations, or in cases involving the proof of

pedigree, and from this point of view may be recommended to the attention of both branches of the Legal Profession. To the student of Legal Biography they are of interest as frequently containing names of former Legal worthies, whole families of whom sometimes pass before the reader. Thus, we find quite a family group of Cæsars, including Charles, son of "Sir Charles Cæsar, Knight, late Master of the Rolls, deceased," who was to be married at "St. Foster, London," which we take to be St. Vedast, Foster Lane; Sir John, son of the "Right Hon. Sir Julias Cæsar, Knight," who was to be married at the Rolls Chapel; and "Julias [*sic*, of course a specimen of delightful 16th century orthography] Cæsar, Doctor of Laws, and one of the advocates of the Arches."

How the Right Hon. William, Lord Byron, Baron of Rochdale, was supposed to be able to contrive being married at the *Cathedral* Church of Westminster in 1685, we do not precisely know. We presume that the clerk who filled in the blanks must have been imitating the good Homer at that moment. The misdescription, however, was of a more tolerable kind for the Dean and Chapter of the Royal Peculiar and College than that by which we understand that of late years, desiring to be licensed for the celebration of marriages, they have allowed their venerable Minster to be described as a parish church in the Diocese of London! What can the shades of the olden Abbots think of such a description? Some who are not shades, however, have suggested that the Bishop of London had long been scheming to effect such a downfall of the special divinity of that solitary grandeur in which the great West Minster stood aloof from all Diocesan delimitations. If the historic and legal interest attaching to Colonel Chester's *London Marriage Licenses* should be so far appreciated by the public as to warrant the issue of a second edition, we hope that Mr. Foster will see his way to altering some of his extracts from the Latin descriptions of parties from the accusative to the nominative. It is hard to see how a "*nautam*," for instance, can have married anybody, though we can understand it of a *nauta*. Some of the vernacular descriptions, particularly when Scotch, Irish, or Welsh names of persons or places occur, stand in need of verification, or at least of annotation, being plainly wild distortions of the original. Some enigmas in genealogy propounded by Colonel Chester from these *Licenses* still remain enigmas, as far as we are aware. We do not think, for instance, that it has yet been

settled who was that "Katherine, Countess of Corneworthe [*sic*, for Carnwath], in Scotland, widow, about 26," who, on 13th February, 1662-3, had license from the Vicar-General's Office to marry Samuel Collins, of London, doctor of physic. On 1st December, 1661, the same Countess had been described as aged 24, in a License to marry "William Watkins, of the City of Westminster, Esq., widower."

A Compendium of the Law of Property in Land. By W. D. EDWARDS, LL.B., of Lincoln's Inn, Barrister-at-Law. Stevens and Haynes. 1888.

There is a strong flavour of Vol. II. of Blackstone's *Commentaries* about the present work, and the writer has avowedly made use of Sir William as an authority. The book is divided into four parts: the rights of ownership, the rights of property inferior to ownership, the transfer of rights of property in land, and the legal capacity with reference to the rights of property in land. These parts are dealt with in detail, and the legal decisions affecting them are carried down to date. The author acknowledges the assistance of a brother member of the Bar of his Inn, Mr. A. B. Woodcock, in the revision of his sheets. A perusal of Mr. Edwards's book cannot but draw the attention of the reader to the fact that modern legislation has removed many of the old distinctions between Realty and Personalty. Indeed, it is by no means unlikely that the difference between the two species of property will be extinguished by future legislation, and the fine distinctions which have amused and puzzled our fathers will become things of the past. Of what practical utility is it to hold that shares in the New River Company are Real property, while the shares of all modern Companies are Personalty? Or that trees sold apart from the land are Personalty, while the same sold with the land are Realty? We may well be spared the infliction of these and other dusty fragments of antiquated lore, and Mr. Edwards's book has done good service in preparing us to deal with such matters from a comprehensible and common-sense point of view.

An Analytical Digest of Cases Decided in the Supreme Courts of Scotland and on Appeal by the House of Lords, 1877—1885. By HENRY JOHNSTON, C. C. MACONOCHIE, and HUGH J. E. FRASER, Advocates. Edinburgh: T. & T. Clark. 1886.

This *Digest*, a continuation of that published in 1878, contains

in very convenient form the pith of the decisions, within the years above stated, of the Supreme Courts in Scotland and on appeal therefrom to the House of Lords. Certain changes in the mode of distributing the cases have been introduced in the current volume, but the general scheme is substantially the same as that adopted in the former issue. One of the changes made consists in the mode of referring to such parts of the Statute law as are, by the respective decisions, brought under review or incidentally noticed. The arrangement differs in some respects from that followed in legal works of a similar character in England; but the Scottish plan would seem, on the whole, to be entitled to the preference. On the other hand, we have not the useful table, to be found in the *Law Reports* and *Law Journal Digests*, of all the Statutes so specially considered or referred to. Where a *Digest* is published in "continuation" of one or more issues of a like character, whether by identical editors or not, it is well to have noted within each successive issue, the number of volumes already in existence, with the periods which they respectively comprise. But this information is not afforded here. Another useful table to be found in the *Law Reports Digest*, that of the Titles and Sub-titles, might well be adopted by our Northern friends, and it would be especially convenient for those to whom the Law of Scotland is not altogether familiar ground. With regard to the body of the work, the effect of the various decisions appears to be given with sufficient fulness; and the different heads, with their subdivisions, are clearly and distinctly specified. There is a list of cases "followed, overruled, and specially considered." The form of the Index of Cases contained in the *Digest* is in agreement with that adopted by the *Law Reports*, and from its greater clearness appears to us better than that selected by rival publications. The volume is an exceedingly handy one, and the type all that can be desired.

Hints on Advocacy. By RICHARD HARRIS, Barrister-at-Law. Seventh Edition. Stevens and Sons. 1884.

In again presenting to the public his *Hints on Advocacy*, Mr. Harris states that he has not ventured to make in this, his seventh edition, any material alterations. He therefore assumes, and the assumption may be pardoned, that continued support involves approval of the work, and that amendment is neither desired nor required. Undoubtedly, there is much in

the *Hints* that the young advocate may read with profit, though it would be a great mistake on his part to infer that if only sufficiently saturated with the contents he could reasonably hope to manage a cause with success. Our author, indeed, points out (p. 221), though hardly so forcibly as might be desired, that the best preparation a man can have, to qualify himself for one branch of the duties of an advocate, is to study carefully the mode in which "the best men proceed, and to acquire a knowledge of character, of human nature, of what is called the world." We should say that the first part of this recommendation is of sufficient importance to be presented to the young aspirant alone. For to study the mode in which the best advocates proceed is safe and valuable instruction, not in one branch only, but in advocacy generally; though, of course, a knowledge of the world is essential to one whose business it is both to examine and to convince men of the world. We think, however, that the statement in the Treatise under review affirms too much in alleging that nine-tenths of the New Trials are due to blunders of advocacy, and in hinting that the Judges are seldom the responsible parties.

Under the head "Cross-examination," sound advice is given, though perhaps there is too great a tendency to suggest devices and ingenuity at *all* times. The following passage, however, is not to be complained of: "A direct question intended to elicit an answer adverse to the witness seldom succeeds." The only question might be whether it was not too obvious a truth to require to be stated at all. But, in justice to Mr. Harris, we cannot avoid recalling that even a distinguished Judge now on the Bench shewed on one occasion so little of the supposed Judicial mind as to attack counsel for putting to a witness indirect questions to prove his drunkenness at a particular time. "What you want to shew is that the man was drunk; then why," continued his Lordship, "don't you ask him at once?" The descriptions of the different classes of witnesses, and the mode of dealing with them may be useful, but we prefer to direct attention to the extracts from the Palmer trial; these are both interesting and eminently instructive. In the warning against "Oratory," in certain cases, we entirely concur, while accepting the remark (which is also a rebuke) that the art of speaking is far too little cultivated by the Bar. Mr. Harris has few competitors in the field. Sheriff Lees is one of the few, in his useful work on *Oral Pleading in the*

Sheriff Court, recently noticed by us. It may be that a larger and more scientific Treatise cannot be looked for where example rather than precept would seem to be the better guide. In the meanwhile, however, the young advocate might do worse than study the hints and illustrations afforded to him in the work before us, while not neglecting the suggestions *in pari materiâ* offered by Sheriff Lees, and which are, in the main, as fully applicable to advocacy before an English Judge as before a Scottish Sheriff.

Rules for the Interpretation of Deeds, with a Glossary. By HOWARD WARBURTON ELPHINSTONE, ROBERT F. NORTON, and JAMES WILLIAM CLARK, all of Lincoln's Inn, Barristers-at-Law. London: William Maxwell and Son. 1885.

The authors of this book are to be congratulated on having discovered a void in legal literature, and on their patient efforts to fill it. No small amount of labour was necessary to codify (for the book is a Code, as far as it goes), without an unreasonable number of "exceptions," such masses of old world learning as have furnished the foundation for their work, and to prove by modern illustration how the principles of Coke's *Institutes*, Sheppard's *Touchstone*, and Cruise's *Digest*, are yet instinct with undying life and vigour. That the seeker after the true interpretation of Deeds would do well to dismiss from his mind all decisions on words as used in a will cannot be pressed home too forcibly, and we are glad to see that the principle is generally observed here. A moderate use of the book in practice, including the test of citation *arguendo* in Court, has confirmed the favourable impression produced on us at its first appearance; and the book may specially be commended as one for noting up, owing to the careful analysis of its subjects under appropriate headings.

The Glossary at the end is, perhaps, more curious than useful; it is certainly incomplete, and is made up by a somewhat arbitrary choice of words. It might well be omitted from subsequent editions of the present treatise. But if the authors would, on such a foundation, furnish the Profession with a new and accurate Law Dictionary, they are evidently competent to do so.

Abordage du Navire de Commerce Français la "Ville de Victoria," et du Cuirassé Anglais le "Sultan." Par M. EDOUARD CLUNET,

Avocat à la Cour de Paris. Paris: Marchal et Billard. 1888.

The able Pamphlet which has lately been put forth by our valued colleague, the learned Editor of the *Journal du Droit International Privé* of Paris, is of twofold interest, both as dealing with an International case of collision in the Territorial Waters of a State not that of either vessel, and moreover between a man-of-war and a merchant vessel, and also as one which was spoken of at one time as affording grounds for an appeal to International Arbitration. The facts are simple, and not disputed. The collision took place in the Tagus, off Lisbon, through the sudden breaking of the chain which kept the British Ironclad, *Sultan*, at the anchorage appointed for her by the Captain of the Port. In the collision which ensued, the *Ville de Victoria*, belonging to the French Company, "Chargeurs Réunis," was sunk, and a serious loss of life and property occurred, which was, under the circumstances, absolutely unavoidable, as the *Ville de Victoria*, being rammed by the *Sultan*, sank within ten minutes.

Expressions of sympathy were at once offered, both on the part of the Channel Squadron, to which the *Sultan* was attached, and in Parliament. The French Chambers, however, wanted something more than sympathy, and when it appeared that no proceedings could be taken against the State in this country, but only against the person of the commanding officer of the vessel causing the collision, a good deal of irritation was manifested, which was perhaps natural rather than reasonable. The suggestion of International Arbitration was then made as a *tertium quid*. M. Clunet examines the various questions thus emerging in the calm light of Juridical Science. He thinks that the privilege of the State, in this country, to immunity for the wrongs done by its servants, the commanders of ships of war, is extravagant, and is certainly so held on the Continent. We are not quite sure whether M. Clunet understands that it operates quite as hardly against British subjects. The Queen herself may run down her own subjects, when on board her own yacht, crossing the Solent, and the survivors have no redress save by action against the officer in command at the time of the collision. The question is obviously, as M. Clunet clearly sees and expresses, one calling for the modification, it may be, of Municipal Law, or for voluntary compensation by the State, but it is not one suitable for International Arbitration.

THE

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I.—THE LEGAL AND POPULAR MEANINGS OF CHARITY.

THE recent Judgment of the Court of Appeal in *The Queen* v. *The Commissioners of Income Tax** must have fallen as a thunderbolt on many charitable institutions, supporting as it does a definition of charity which is very alien to the spirit of the times. Though the Equitable definition of charity in England grew up in a very anomalous manner, a long series of decisions from the days of Sir Francis Duke in the early part of the seventeenth century down to the present time, seemed to have made it an established principle of our law that the term charity, or charitable trust or use, could only be explained by reference to the Statute of Elizabeth (43 Eliz., c. 4). The list of uses there given as not having been employed "according to the charitable intent of the givers and founders thereof," was taken as a description, *by sample*, of the kind of use which the legislature recognised as charitable and protected by the now obsolete system of Commissions which that Statute provided.

Prior to the passing of that Statute, perpetual trusts (similar to those since known as charitable) had been recognised and protected in the Court of Chancery, but the term "charity," in the English Common Law as in the Civil Law, was unknown. The perpetual trusts which were so protected were almost entirely of an ecclesiastical

* L.R. 22 Q.B.D. 296.

or religious nature, and it was more on this footing as "pious uses" than on the ground of charity, that they received such protection. It is noticeable, however, that in the Calendars of Proceedings in Chancery, published by the Record Commission, we find the term "charity" used in a bill of complaint filed in the reign of Henry VI. by one William Babington against William Gull, in whose hands the plaintiff's mother had placed 600 marks "for the purpose of founding a charity in the church of St. Peter of Flawforth." The Statute of Elizabeth does not give on the face of it any definition of a "charitable use"; it refers to the term as one already well-known, but the popular usage being apparently somewhat vague, especially under the confusion which recent religious changes had caused, instances of the kind of trust, abuses in which were to be enquired into by the new Commissions, were given in the well-known preamble, which is repeated in the Mortmain and Charitable Uses Consolidation Act, 1888, while the rest of the Statute is repealed.

The Reformation and the Suppression of the Monasteries had then recently given rise to the doctrine of Superstitious Uses, which found expression in the two statutes 23 Hen. VIII., c. 10, and 1 Edw. VI., c. 14, and which is still part of our law, except in so far as it has been curtailed by the various Toleration Acts and by the Roman Catholic Charities Act, 1862. Considerable doubt seems to have been felt at the time as to the validity of other uses which had been closely bound up in the past with the uses now called Superstitious. An Act of Elizabeth, prior to the so-called Statute of Charitable Uses (43 Eliz., c. 4) expressly authorised the giving or bequeathing during the 20 years then next ensuing by any person, in fee simple, of all or any part of his lands, tenements or hereditaments, as well to the use of the poor as for the provision, sustentation, or maintenance of any house of correction, or abiding houses, or of any stocks or

stores.* The Act not having "taken such effect as was intended by reason that no person could erect or incorporate any hospital, houses of correction, or abiding places," without a license in mortmain, power was given by a later Act† to erect, found, and establish one or more hospitals, *maisons de dieu*, abiding places, or houses of correction, which should take lands to the value of £200 per annum without license in mortmain.

The Statute of Charitable Uses, which was passed not for the purpose of defining charities, but to provide a remedy for abuses in the administration of perpetual trusts, then existing, or afterwards to come into existence, gives incidentally the list above-mentioned, illustrating the kind of trusts intended, in order to shew which of them were still valid despite the doctrine of Superstitious Uses. But it is perfectly clear that the thing and, to a certain extent, the name also, existed long before the Statute of Charitable Uses was passed. Nevertheless, the words "charitable use" in the so-called Mortmain Act, 9 Geo. II., c. 36, have always been construed as referring to this preamble; and in the Charitable Trusts Acts, on which the jurisdiction of the present Charity Commission is based, "charity" is defined as meaning "every endowed foundation or institution taking or to take effect in England or Wales, and coming within the meaning, purview or interpretation of the Statute 43 Eliz., c. 4, or as to which, or the administration of the revenues or property whereof, the Court of Chancery has or may exercise jurisdiction. The two parts of this definition have hitherto been regarded as co-extensive. Now the decision of the majority of the Court of Appeal in *Queen* v. *Commissioners of Income Tax*‡ was shortly this, that in a Revenue Act, extending to all parts of the United Kingdom, the term "charitable" must be construed in a sense under-

* 35 Eliz., c. 7, sec. 27. † 39 Eliz., c. 5. ‡ 22 Q.B.D. 296

stood throughout the United Kingdom, that it is understood throughout the United Kingdom only in its popular sense, and that in its popular sense the term is confined to gifts in trust to assist persons to obtain something which by reason of poverty they could not otherwise obtain, or, more briefly, to the relief of poverty. Poverty in the recipient is thus made an essential feature of a charitable gift in the popular sense. That it was in the popular sense that the term was used in the Income Tax Act had been already decided by the Scotch Court of Session in *Baird Trustees* v. *Inland Revenue*,* and that decision had certainly considerable weight with the English Court. One of the main questions that had to be answered was whether, in Scotland and Ireland the term charity or charitable trust or purpose was employed in the same sense which had long been given to it in English Courts of Equity, and on such a point the judgment of a Scotch Court of Appeal would naturally seem to be an important guide. The correctness of supposing that there is one law of charitable trusts for England and another for Scotland or for Ireland has, however, been questioned by Lord Justice Fry in his minority judgment in *Queen* v. *Commissioners of Income Tax*, where a number of Scotch and Irish cases, recognising the existence of charitable trusts in the English sense, were referred to. He held that the English doctrine of charity applies in Ireland certainly, and, according to the highest authority, that of the House of Lords, in *Clephane* v. *Lord Provost of Edinburgh*,† in Scotland also. If that is the case, the argument that the word must be used by the Legislature in the popular sense, as being the only sense known throughout the Kingdom, would fall to the ground; and the tremendous difficulty of explaining what is popularly meant by a charitable purpose would need to be faced no

* 25 Scottish Law Reporter, 535; 15 Sc. Sess. Cas., 4th ser. 682.
† L.R. 1 H.L. Sc. 417.

longer. We should also be saved from the necessity of supposing that the Legislature has sanctioned, by granting to certain gifts exemption from taxation, a principle of giving which runs directly counter to the policy of the English Law.

It is true that in popular language "charity" is usually supposed to have the poor as its objects. We talk of "living on charity," of the "indiscriminate charity," that is, indiscriminate almsgiving, which the Charity Organisation Society labours to abolish, and it might even be said that among most people the idea of "charity" was confined to almsgiving. A charity school, again, is one in which not education alone, but food and clothes are given, and in which the children are admitted distinctly as poor. To give a man work "out of charity" is to employ him because of his poverty. Poverty, however, is a relative term, and if we make this our standard of charity in construing an Act of Parliament we must necessarily, sooner or later, draw the line somewhere and fix a certain income, to exceed which shall disqualify persons as recipients of a charity. The judgments of the Master of the Rolls and of Lord Justice Lopes aim at meeting this difficulty by suggesting that the question is not one of poverty in the abstract, but of just such poverty as makes it impossible to obtain the benefits which the charity is intended to confer without assistance. But on this principle, if logically carried out, the phrase charitable purposes might be made to cover any trust intended to give to people, whether in the ordinary sense rich or poor, something which they would not obtain otherwise. A trust to provide the Canons of St. Paul's with a steam-yacht apiece would be charitable in this abnormal sense, and so would a trust to furnish incomes of £1,000 a year to all members of Parliament. It is difficult indeed to see what trusts could not be brought within the meaning of charitable according

to this definition. The ability to obtain such a benefit as that of education is measured rather by the intensity of a man's desire for it than by the size of his income. By the rich man, as by the poor man, it can be obtained only with the sacrifice of a certain amount of income, which would otherwise go to satisfy other desires. Lord Justice Lopes, in *The Queen* v. *Commissioners of Income Tax*, concurred with the Master of the Rolls in upholding as charitable in the popular or ordinary sense, trusts (1) for the purpose of maintaining, supporting, and advancing the missionary establishments, among heathen nations, of the Moravian Church; (2) for the maintenance, support, and education of the children of ministers and missionaries of the church, "special regard being had to the children of such ministers as are least able to support the expense of their children's education"; and (3) for the maintenance and support of certain establishments appertaining to the said church for single persons, called choir-houses, within the United Kingdom. He did so on the ground that "these are all purposes which could not be carried out without the income in question, and that the income is used in the education and instruction of those who could not provide this instruction for themselves." It might possibly be argued that these words would apply to any income which is given for a specified purpose not previously provided for, but it is clear that we must take the second clause of the sentence as qualifying the first, and the argument therefore would not be a fair one. But, taking the second clause, what are we to understand by the phrase "could not"? We obviously must, in the first instance, supply the words "by reason of poverty;" but even then does "could not" mean "could not without inconvenience," or "are absolutely unable"? The Master of the Rolls said, "If I thought that the first of these purposes was a purpose to convert rich heathen or heathen without regard to their poverty, I

should think it not within the definition of 'charity.' But I have read the trust, and it seems to me to be for the religious instruction of poor heathen who but for that would not get such instruction. Another part of the trust is for the education of the children of missionaries. In this case I think the donor intended the assistance to be given because of the poverty of the missionaries. As to the choir-houses, I can see clearly that the donor thought he would be benefiting people who required it by reason of their poverty." It is certainly not the characteristic of all missions to be concerned with converting the poor only, and it does not appear that Moravian missions in general exclude the richer heathen from all participation in the benefits which they offer, or aim at anything else than the conversion of the heathen without regard to their poverty. Again, missionaries and ministers, though not usually men of large income, could only in a secondary sense be called "unable" to provide education for their children, and the very provision that "special regard" should be paid to the children of ministers least able to support the expense of their children's education, would seem to shew that some regard at least should be paid to the children of ministers in a more prosperous position. Such are some of the difficulties which beset a definition of charity depending on a definition of poverty.

The relief of poverty, merely as poverty, by private individuals is contrary to the policy of English law. The relief of the physical wants of the poor is cared for by the State through the agency of Boards of Guardians in workhouses and workhouse infirmaries. Workhouse schools and industrial schools are provided by the State for the education of the poor, *quâ* poor, and their religious wants are similarly attended to by State-appointed chaplains. The distribution of doles of money, food, and clothing to the poor has been dis-

couraged both by direct legislation and by the action of Courts of Equity in applying *cy-près* to wiser purposes the increased income of dole charities. The Endowed Schools Act, 1869, in sec. 30, provides for the application to educational purposes, by scheme of the Charity Commissioners, with the consent of the governing body, of endowments the income of which is applicable wholly or partially for the purpose of (1) doles in money or kind; (2) marriage portions; (3) redemption of prisoners and captives; (4) relief of poor prisoners for debt; (5) loans; (6) apprenticeship fees; (7) advancement in life; (8) or any purposes which have failed altogether or have become insignificant in comparison with the magnitude of the endowment, provided that it was originally given to charitable uses in or before the year 1800. The City Parochial Charities Act, 1883, was directed mainly to the application to new and better uses of the numerous dole charities attached to City parishes, such new uses including secondary and technical education, libraries, museums and art collections, open spaces and recreation grounds, working men's and women's institutes, and convalescent hospitals. It is to a certain extent, but not solely, in the interests of the *poorer* inhabitants of the metropolis that these objects are to be carried out. In the *Campden Charities Case*,* decided in 1882, a scheme of the Charity Commissioners was upheld by the Court of Appeal, applying a portion of the income of an ancient dole charity, which had increased enormously in value, in (1) the relief of poor deserving inhabitants in cases of sudden sickness or other exceptional distress; (2) the subsidizing of a dispensary, hospital, or institution for providing trained nurses for the poor; (3) in payment of pensions to deserving and necessitous inhabitants; (4) in contributions to provident societies;

* L.R. 18 Ch. D. 310.

(5) in payments to encourage the continuance of the attendance at elementary schools of children above the age of eleven; (6) in exhibitions tenable at places of higher education; (7) in providing lectures or evening classes for the benefit of former scholars at public elementary schools. Here, though in some cases the persons to benefit from the new application of the income are still to be poor, the whole income is no longer confined to them. Schemes under the Endowed Schools Act, under which the old free (*i.e.*, gratuitous) grammar schools or charity schools are converted into schools at a fixed fee, are by sec. 11 of the Act of 1869 to shew "due regard" to the educational interests of any class of persons (including, as amended by sec. 5 of the Act of 1873, persons in a particular class of life) who were entitled previously to the scheme to any privileges or educational advantages, but it has been held that this provision is satisfied if persons so entitled are not placed by the scheme in a worse position than the generality of the public.

The policy of the law, which is to be seen in these enactments and decisions, may, of course, have been departed from in a special statute, especially when that statute was passed so long ago as the fifth year of the present reign, as it is only in recent years that the opposition to "poor's charities," as they have been called, has developed. But the same phrase, "charitable purpose," has been used in the Customs and Inland Revenue Act, 1885, which also incorporates the earlier Act, and it could hardly be supposed that the words were employed in two different senses in the two Acts, both dealing with taxation, unless the change of meaning was actually stated.

But, if it appeared that the terms charity and charitable purpose were known and used in a technical legal sense in Ireland and Scotland no less than in England, there would be no need for us to go out of our way to find a popular

meaning for those terms, nor to suppose that exemption from taxation had been granted to that kind of charitable trust only which has usually been least favoured by our legislators and judges. It may be useful to review the Scotch and Irish cases at somewhat greater length than was done in the Judgment of Lord Justice Fry. That the terms charity and charitable have not, in Ireland, been generally confined to the relief of the poor seems clear enough. Although the Statute of Charitable Uses (43 Eliz., c. 4) does not apply to Ireland, yet there is a somewhat similar Irish statute (10 Ch. I., sess. 3, c. 1), providing a remedy against bishops and archbishops who were trustees for charitable uses, and giving a list of such charitable uses, which has been construed in an Irish case, *The Incorporated Society* v. *Richards*,* as containing by implication a definition of charitable uses for Ireland, similar to that which has been extracted by English Courts of Equity from the English Statute. The list of trusts is still wider than that given in the English Statute, and is as follows:—(1) for the erection, maintenance, or support of any college, school, lecture in divinity, or in any of the liberal arts or sciences; (2) for the relief or maintenance of any manner of poor, succourless, distressed, or impotent persons; (3) for the building, re-edifying, or maintaining in repair any church, college, school, or hospital; (4) for the maintenance of any minister and preacher of the Holy Word of God; (5) for the erection, building, maintenance, or repair of any bridges, causeyes, cashes, paces, and highways within this realm; (6) for any other like lawful and charitable use and uses warranted by the laws of this realm, now established and in force. A bequest of " the remainder of my unsettled real estate unto the Incorporated Society in Dublin for promoting English Protestant Charter schools

* 1 Drury and Warren, 258 (1841).

in Ireland," was, therefore, held charitable, as coming within the first of these purposes.

Similarly in the case of *Commissioners of Charitable Donations* v. *Walsh*,* the following legacies in testatrix's will were declared charitable:—(1) £50 for three solemn masses; (2) £15 for the entertainment of the Roman Catholic clergy who should celebrate such masses; (3) £10 to the trustees, as Roman Catholic clergymen of the chapel of Mullingar; (4) £20 to be by them paid to a third clergyman of the said parish of Mullingar; (5) £20 to be by them laid out for a Roman Catholic free school; (6) £10 to be by them laid out in the purchase of books for the improvement of the Catholic inhabitants of Mullingar. Of these, the first four are religious, the last two educational trusts, the fifth alone corresponds directly with any of the uses mentioned in the Statute of Charles I., but all are held charitable as coming within the intention of that Statute. In a very much more recent case, *Attorney-General* v. *Delaney*,† a legacy to provide masses for the souls of the testatrix and her brother was held to be subject to legacy duty as not being charitable, but it was said that it would have been charitable if it had appeared on the will that the masses were to be said in public.

In the case of Scotland the state of the law is no doubt somewhat more uncertain. There is no Statute for Scotland corresponding either to 43 Eliz., c. 4, for England, or to 10 Ch. I., sess. 3, c. 1, for Ireland; but there is a fair number of cases showing that the term charity is used in Scotch law in a manner analogous to its use in England and Ireland, extending to other purposes than the mere relief of poverty, and there is also clear statutory authority for classifying "educational purposes" in Scotland as charitable.

* 7 Ir. Eq. Rep., 34 n. [1823]. † I. R. 10 C. L. 104 [1875].

There is, indeed, a *dictum* of Lord Brougham's in a comparatively early case, *Miller* v. *Black's Trustees,** to the effect that the extended meaning given to charity in England by reference to the Statute of Charitable Uses was unknown in Scotland, but even in that case a purpose going beyond the mere relief of poverty was held by the House of Lords to be charitable, it having been already admitted by the counsel who argued against the charity in question that bequests to the Glasgow Infirmary, to the Lock Hospital, to the Magdalene Asylum, and to the School for the Instruction of Deaf and Dumb, were all of a charitable and benevolent nature.

No argument should, perhaps, be drawn from the fact that a hospital like Heriot's, "for the upbringing, maintenance, and education of poor fatherless boys," is spoken of in the Judgment of the Court of Session as charitable,† although, according to the Judgment of the same Court in *Baird Trustees* v. *Inland Revenue*‡ it is only the relief of the *physical* wants of the poor that is a charitable purpose within the meaning of an Act which extends to Scotland. If, in accordance with the Judgment of the Court of Appeal in *Queen* v. *Commissioners of Income Tax,*§ we take poverty in the recipient to be the test of a charity, then the Heriot Hospital is clearly within the definition. The same remark applies to the case of *Magistrates of Dundee* v. *Presbytery of Dundee,*|| where the hospital was formerly granted "*ad sustentationem fratrum et infirmorum, senium et ægrotantium ibidem,*" and to the case of *Dundas and others, Petitioners,*¶ where the trust was "for the establishment and maintenance of an hospital for the education of female children of poor but respectable parents for house

* 2 S. and McL. 866 (1837).

† *Ross* v. *Governors of Heriot's Hospital,* 5 D. 589 [1843].

‡ 25 Sc. Rep. 533 [1888].

§ 22 Q.B.D. 296.

|| 4 Macq. 228 [1861].

¶ 7 Macph. 670 [1869].

servants, for their encouragement during service, and ultimate provision in old age."

Education, however, apart from poverty, in those who are to benefit by it has been held charitable in more than one case, as in *Murdoch* v. *Magistrates of Glasgow*,* where the testator left £5,000 "to be laid out in lands for the maintenance of a school for boys for reading, writing, and arithmetic;" in *Rev. D. McDougall (Caw's Trustee) Petitioner*,† where the annual produce of a certain estate was to be paid "to the person officiating for the time as schoolmaster in connection with the Established Church in a parish;" and in *Ferguson Bequest Fund* v. *Commissioners of Educational Endowments*,‡ in which a fund created partly for the support of schools, other than parish schools, for payment of salaries or in supplement of the salaries of teachers of schools of or in connection with certain churches, and for missionary schools and libraries being under the superintendence or management of members in full communion with one or other of the said churches, was held to be an educational endowment within the meaning of the Educational Endowments Act, 1882, sec. 1, educational endowment being there defined as "any property dedicated to charitable uses and applied or applicable in whole or in part for educational purposes."

This Act seems to put it beyond question that educational purposes are in Scotch Law charitable. In sec. 10, occurs the following sentence:—"Where any part of an endowment is an educational endowment within the meaning of this Act, and part of it is applicable or is applied to other charitable purposes, the scheme shall be in conformity with the following provisions." From the Report in *Hansard* of the debate in Committee of the House of Commons on the Educational Endowments Act, it appears that the fact

* 6 S. 186 [1827]. † 5 R. 1,014 [1878]. ‡ 14 R. 624 [1887].

of educational endowments being described as charitable was not overlooked. The present Attorney-General, then Mr. Webster, proposed by way of amendment that the words "dedicated to charitable uses," in the first section, should be omitted; but on the declaration of the Lord Advocate that the words were necessary to the definition of educational endowments in order to distinguish gifts for educational purposes of a private or temporary nature, the question was put and agreed to, and the amendment thrown out.

Religion has also been held a charitable purpose in Scotch courts. In *Grant* v. *Macqueen*,* a trust for payment of a moiety of the income of a certain sum to the "parliamentary minister of the Established Church at Rothiemurchus" was upheld as a charity by the Court of Session. The Ferguson Bequest Fund was generally for "the maintenance and promotion of religious ordinances, and education and missionary operations;" and among the objects more particularly specified, were "the erection and support of churches," the supplementing of the stipends or salaries of the ministers of certain churches, and payment or supplementing of the salaries of religious missionaries in connection with those churches. In the report of the *Ferguson Bequest Fund Case*,† the fund is described in the marginal heading as charitable, and was in the later case against the Commissioners of Educational Endowments‡ declared to be an "Educational Endowment" within the definition of the Act, and therefore charitable.

McLaren, in his book on the Scotch Law of Wills, has a chapter headed "Of Charitable Bequests," and treats in sec. ii. of that chapter of "Property of Religious Societies." The advancement of learning which has been held to come within the purview of the English Statute of Charitable Uses,

* 4 R. 754 [1877]. † 6 R. 486 [1879]. ‡ 14 R. 624.

has been treated in Scotland also as a charitable purpose, in *McLean* v. *Henderson's Trustees*,* where a testator left the residue of his estate to be "applied by my said trustees in whatever manner they may judge best for the advancement and diffusion of the science of phrenology, and the practical application thereof in particular." The following sentence in the Judgment of Lord Ormidale, in which Lord Gifford concurred, has a wide application :—"Nor do I think there is anything in the suggestion that in all the cases referred to the bequests were such as would be held to be of a charitable character under the Act 43 Eliz., c. 4, or the Mortmain Act (9 Geo. II., c. 36), for, although the Acts have no operation in Scotland, the principle of them, so far as the present case is concerned, may very well be held to apply."

The encouragement of good servants, which in *Miller* v. *Black's Trustees*† was spoken of in the will and recognised by the Court of Session as a charitable purpose, would come, according to the English classification of charities, under the head of a general public use, which is the most comprehensive class of all. The trust was for "yearly payments to faithful domestic servants settled in Glasgow or the neighbourhood, who can produce testimonials of good character and morals from their masters or mistresses after ten years' service." On the analogy of this case we might extend the term charity in Scotland, as in England, to any general public purpose.

It thus appears that "charity" has both in Scotch and Irish law a meaning very similar to that which it has long borne in England, and is not confined in either country to the relief of the poor. It is now, however, established law both in England and Scotland that in the Income Tax Act the word is used in that narrower meaning. In Ireland,

* 7 R. 601 [1880]. † 2 S. and McL. 866 [1837].

where a similar question was raised on the construction of a Legacy Duty Act, the Court of Exchequer felt itself bound by the decision of the Court of Chancery that the legacy in question was a charitable bequest. The meaning of the word in the Income Tax Act has not yet been decided in any Irish Court. The English and Scotch decisions are not quite to the same purport, the Scotch Court holding that charity in its popular sense is confined to the relief of the physical wants of the poor; while the Master of the Rolls and Lord Justice Lopes, in the English case, were express in including mental and religious necessities in those wants of the poor in the relief of which charity was held by them to consist.

There is at present no unanimity in the decisions on this point in the three countries. It is a question of considerable importance, which must affect a large number of institutions held charitable by the English law and not coming under either of the other exemptions contained in the Act. It is much to be desired that a definite and uniform construction of the language of the Act, which would hold good in all parts of the United Kingdom, should be arrived at; but this a Judgment of the House of Lords could alone effect.

R. E. MITCHESON.

II.—THE PRESENT POSITION OF THE LAW OF RIVER AND LAKE FISHERY.

IT will be convenient at the outset to make some classification of the different kinds of fishery mentioned in the books. The most natural classification, then, will be into Public and non-Public Rights of fishery; the former being a Common Fishery, and the latter being again divided into a Common of Fishery, a

Free Fishery, and Several Fishery. These terms have been almost inextricably confounded by many authorities at different times: some* mistaking Common Fishery for Common of Fishery; others using the phrases Free Fishery and Several Fishery indiscriminately; others† again making no distinction whatsoever between Common of Fishery and Free Fishery: but out of the curious tangle —and many efforts have been made by the Bench to clearly define these words and use the terms with precision (notably by Willes, J., in *Malcolmson* v. *O'Dea*, 10 H.L.C. 619 [1863])—the classification hereunder shewn seems to be the one which is supported by the greatest number of authorities. However that may be, it is at all times advisable to have the meaning of terms clearly explained, and it is in the senses indicated that the terms will be used in the following Article:—

RIGHTS OF FISHERY.

PUBLIC	NON-PUBLIC.	
COMMON FISHERY (uncontrolled right in every person without distinction: e.g., *in general*, in all tidal waters). In Gross.	May not have an individual owner.	May have an individual owner.
By Custom COMMON OF FISHERY (Appurtenant: may have many, generally *unnamed*, owners, who hold as fulfilling a certain capacity, and having a common designation; *e.g.*, tenants of a Manor).	By Grant FREE FISHERY (In Gross; Appurtenant; may have two or more owners, specified by name in grant (which does not exclude grantor's right). [Bloomfield *v.* Johnston, 8 Ir.R.C.L. 68.]	SEVERAL FISHERY (In Gross; Appurtenant Appendant: [Mayor of Orford *v.* Richardson, 4 T.R. 437.] A separate and undisturbed right to entire fishing over a certain area).

* *Lord Fitzwalter's Case*, 1 Mod. 105.

† *Woolrych on Waters*, p. 123; Whiteside, C. J., in *Bloomfield* v. *Johnston*, 8 Ir.R.C.L. 68.

River and Tide.

Under tidal waters the soil is in the Crown, and the right of fishing in these waters is in the public without distinction of persons.* "As a public right belonging to the people it *primâ facie* vests in the Crown, but such legal investment does not diminish the right or counteract its exertion;" † or, as some authorities put it, the right is in "the Crown as trustee, the *cestui que trustent* being in possession." This, then, is the broad rule, subject of course to exceptions. But what does the word "tidal" mean under this general rule? How far up the sea-shore? And how far inland in rivers and estuaries and creeks? The convention underlying the rule that navigable (*i.e.*, tidal) rivers are, like the open sea, the subject of a public common fishery, is to regard indentations in the coast line, not as gaps or defections of dry land, but as outgrowths of the ocean [*cf.*, "arm of the sea"]; and, so, wherever the ocean influence manifests itself by rising and falling twice every twenty-four hours, up to the limit of such influence the right of general public fishery prevails. This right of common fishery on the sea coast and estuaries is limited landwards (in the absence of usage, and such exceptions as will be afterwards noted), by the mark of medium or ordinary high tides—that is, up to such a line as is touched by the tide on four days in the week; and not, as in the Civil Law, to the point reached by extraordinary high tides or by the sea during Winter storms. The meaning of the word "tidal," in the case of rivers, was discussed in *Reece* v. *Miller*, 8 Q.B.D. 626. The question arose whether a certain point in the river was affected by the public right of fishing. At the point in question the water was not salt

* *Lord Fitzwalter's Case*, 1 Mod. 105.

† Schulte's *Aquatic Rights*, 15.

or ordinarily influenced by the tides: at extraordinary high tides the water was affected by being dammed back. It was decided that the water was not there "tidal" under the rule. The same matter was commented on by Lord Mansfield, in *R.* v. *Smith*, 2 Doug. 44. It was contended there that the Thames above London Bridge "was not 'navigable,' though flowing and re-flowing, such flow and re-flow being due to the damming back by the salt water" —presumably at each ordinary tide—and that such phenomenon was no criterion of "tide" properly so-called. Lord Mansfield held this contention inadmissible, and decided that this water so affected was "tidal," which agrees substantially with the decision in *Hume* v. *McKensie*, 6 Cl. & Fin. 628, that the "tide" is not confined to salt water merely, but includes that portion ponded back. Following the decision in *R.* v. *Smith*, the Supreme Court of the United States has determined that "if the effect of the tide on the current is so great as to occasion a regular rise and fall of water, it would be within the ebb and flow of the tide:" 2 *Pegroux* v. *Howard*, 7 Peters (U.S.) 324.

The word "navigable" has been used above; at Common Law and in this connexion it is equivalent to "tidal." Navigable in fact and navigable in law are thus very different; we may have streams and rivers which are so deep as to be capable of allowing boats and coasting-vessels of considerable draught to float further inland than the highest river tide-mark; but in such cases, though the river is open for navigation, it is not legally "navigable," so as to confer on the public a right of common fishery, such as they possess in the sea. "There can be no right in the "public to fish in quasi-navigable rivers if they are non-"tidal."* In the important Irish case of *Murphy* v. *Ryan*, Ir.R., 2 C.L. 143 [1868], O'Hagan, J., said: "No river has

* *Hargreaves* v. *Diddams*, L.R. 10 Q.B. 582. *Pearce* v. *Scotcher*, 9 Q.B.D. 162.

"been held navigable so as to vest in the Crown its bed "and soil, and in the public the right of fishing, because "it has been used as a general highway for the purposes "of navigation. I adopt the statement of Chancellor "Kent (Comm. III. 412): 'In the C. L. sense of the term, "those only 'were deemed navigable rivers in which the "tide ebbed 'and flowed.'" He also quoted *Malcolmson* v. *O'Dea*, 10 H.L. Cases 619, to the same effect.

Though *primâ facie* all tidal waters are public, yet a subject may have a several fishery on the shore or in a creek or estuary, to the exclusion of the public. "There may be a prescriptive right to a several fishery in an arm of the sea."* "There may be prescription in a creek or arm of the sea, not only for a free fishery but for a Several fishery."† However, the presumption is against his holding any portion in severalty for the purpose of fishing; and he must establish his right by evidence either of ancient grant from the Crown before Magna Charta, or of exclusive immemorial user (or prescription) which presupposes a grant. Religious bodies formerly, as corporations, could also hold a several fishery. In *Little* v. *Wingfield*, 11 Ir.C.L.R. 63, undisturbed possession by a party for thirty years was held to be some evidence to warrant a presumption of legal grant, but weak evidence, unless documentary titles were produced; and it was decided that if there were two competing grants from the Crown, the jury might assume a grant from the predecessor of one of the parties to the other; O'Brien, J., saying: "The result of the plaintiff's proposition would be that the "greater the length of possession and the stronger the "grounds for presuming a grant, the greater would be the "difficulty of a jury acting on such a presumption; such a "restriction upon the doctrine of presumption would in

* *Orford* v. *Richardson*, 4 T R. 437. † *Hargreave's Tracts*, p 9.

"many cases nullify its principles and defeat the object "for which it was established." In *O'Neill* v. *Allen*, 9 Ir.C.L.R. 132, the plaintiffs asserted a right of several fishery on the sea coast to the East of the estuary of the River Bann, towards Portstewart, Co. Londonderry, and put in proofs of certificates and grants of Charles and Elizabeth, and Charters from 1666, and proved generally immemorial possession. It was held that they had a several fishery at the place in question, and, moreover, that the absence of proof of user of the fishery from 1701 till 1799 would not amount to such non-user as to defeat their right. Lord Hale recognised the right in a subject to hold a several fishery in tidal waters; and in *Carter* v. *Murcott*, 4 Burr. 216, it was said that "the Crown may grant a several fishery in a navigable river as in an arm of the sea." But as intimated above, and in this connexion, it is of importance to note the words of c. 16 of the Great Charter of Hen. III. to the following effect: "No banks shall be defended from henceforth, but such as were put in defence in the time of King Henry our grandfather, by the same places, and by the same bounds as they were wont to be in his time." Thus the right to exclude the public and create Several fisheries was in the Crown before Magna Charta; but such action on the part of the King by his prerogative was made illegal from that date. So where a Several fishery in a navigable river had been appropriated by the Crown prior to Magna Charta, a grant in Crown Patent of "all salmon "fisheries . . . . of and in said river" passed a several fishery therein. *Ashworth* v. *Brown*, 7 I. Jurist O.S. 315. Since the date of Magna Charta, the Crown cannot create a several fishery in a navigable river: *Duke of Devonshire* v. *Hodnett*, 1 Hud. & Burr. 822. But if a river were, previous to Magna Charta, appropriated by the Crown, or a private person, or, as the phrase goes, "put in defence," there may be an effectual grant of it: O'Hagan, L., in *Neill* v.

Devonshire, 8 App. Cases, 158. A distinction might be taken here between the action of the King personally and that of the Crown so-called, now regarded as the impersonal trustee for the public of the soil of tidal waters. If these were confounded, it might be argued, "Why object to the King's enclosing and making separate a certain space, when all the soil of tidal waters was vested in the Crown?" One reply might naturally be that the granting of the soil is one thing, and the enclosing of a particular area for any purpose over that soil, is another. But it could well be that the greater distinction is the one above-mentioned. After Magna Charta, of course, the prerogative could still be exercised in the matter of granting Several fisheries to private persons, but the fisheries thus dealt with were such only as had been "put in defence" prior to Magna Charta. In other words, certain spaces in navigable and non-navigable waters were allowed to be kept enclosed (separate: several) by, or regranted to, certain persons if such spaces had been actually private before the granting of the Great Charter. And it has been held (5 L.R. Ex. 127) that when a Several fishery had been granted before Magna Charta, it would not merge in the Crown by forfeiture or otherwise, so as to annihilate it or prevent by the force of the Statute its re-transfer. In a late case, *Devonshire* v. *Pattinson*, 20 Q.B.D. 263 [1887], the meaning of the phrase "putting in defence" was discussed, and the question was raised whether such "putting in defence" was anything more than temporarily for the use of the King and his suite, also as to whether such "putting in defence" or grant to a subject would necessarily exclude the riparian owners' right of fishery. But the latter question has to do with non-tidal waters, and will be touched on below. Before the Great Charter weirs had been erected on the shore, as well as on rivers, and by cap. 33 we have the following enactment: "*Omnes Kydelli . . deponantur . . per totam Angliam*

"*nisi per costeram maris*"—evidently recognising* the right in those who had weirs on the shore. These weirs being for the most part firmly built, would, even on the sea-coast, to a certain extent hinder navigation; but, because to a much less extent comparatively than in navigable rivers, they were expressly excluded from the sweeping section of the Great Charter; though some time afterwards (25 Ed. III.; 1 Hen. IV.; 12 Ed. IV.) they were fully dealt with.

Suppose a tidal river, being the boundary between the properties of two riparian proprietors, leaves its bed, and from a certain point onwards breaks through the land of one of the landowners, making its way to the sea by a new channel (in the nature of things the new channel must also be tidal as far landwards as to the level of the original tide mark): Question,—does the right of the public attach to the tidal portion of the new stream thus carved out? For this case the decision in *Mayor of Carlisle* v. *Graham*, 4 L.R. Ex. 361, is a sufficient answer. It was there held that the public could not follow the river into its new channel although it was really tidal; and this decision was based on the principle enunciated in *Murphy* v. *Ryan* (above referred to), viz., that the common right of the public arose from the fact that the soil under tidal waters is in the Crown, and the not too violent assumption that every river is taken to have flowed along its present bed since pre-historic times—not at all from the fact of the water being tidal, though indeed, as it happens, the extreme range of the tide landwards, by the well-known convention, serves to mark the limits of the Crown rights in the soil: it is a matter of land, not of water. The result of this decision was to debar the public from the new tidal river suddenly formed; for the soil there had been always in a private owner; it was his

* See speech of Serjt. Merewether.

still; the river in its irruption carried no Crown right to the soil with it; and that being so, the right of common fishery was gone. In the Irish case, *Miller* v. *Little*, 4 Ir. L. R. 305 [1878], the foregoing case was quoted as an authority to be followed. But though the circumstances of the two cases were similar in one respect, viz., that the river had altered its course in flowing oceanwards, yet in nearly every other respect the cases were different. In the latter case there was a wide tidal estuary, in which—at low water—the river had a well-defined course. In this tidal portion of the stream, plaintiff and defendant, in spite of its being tidal exercised each a right of Several fishery as far as the "middle thread" of the river at low water, though it did not appear, and does not by any means follow, that such middle line separated equal areas in the estuary. No difference arose regarding the rights of the parties in the waters at full tide (when the sea covered the foreshore on both sides), most probably because at all times the salmon were to be found in the deep river channel: nor was the right of either to a Several fishery questioned by the other, or by any outsider. The matter, then, was narrowed to a determination of the following. The well-known channel, carved out in the estuary, shifted from its former position—not to one outside the estuary (as in the last quoted case)—but to a new position within the boundary of Crown (or public) soil. Did the right of the parties remain as before, *i.e.*, bounded by the "*medium filum aquæ*" (which was now in a new position entirely), or was the fishing right of that litigant from whom the river moved bounded by the middle line of the old river-bed? And it was decided that the rights of the parties were, with regard to the stream in its new position, relatively as before, *i.e.*, to the "middle thread," and that they were not bound by a hard-and-fast line in the soil in the centre of the ancient river channel. The disturbing element which existed in the preceding case,

viz.: the property of, so to speak, a third party (*i.e.*, neither claimant nor Crown), in the soil of the new watercourse, was absent in the latter case, for here the river channel was in both positions equally in Crown soil, so the ownership of it was a factor which might be and was neglected.

When a river is made navigable [*i.e.*, tidal], by any means, the fact of its being altered in character will not give the public a right of fishing; for by supposition, the soil is not in the Crown, and unless that be so, the public have no right of common fishery. In the famous case of *Malcolmson* v. *O'Dea*, 10 H.L.C. 619 [1863], a patent grant of Elizabeth was put in evidence to establish the right of the claimants to a Several fishery on the Shannon. The Irish Courts held that such a grant was too recent to give title, as there was nothing to shew that the public had not a prior claim to a common' fishery (*i.e.*, non-exclusive), and that it was illegal for the Crown to create a Several fishery so late as the reign of Elizabeth. But it was decided by the House of Lords that the grant of the patent in the reign of Elizabeth was *primâ facie* evidence of a legal origin for the Several fishery; and that such patent was to be taken as recognising a Several right existing at the place formerly from a time antecedent to Magna Charta, more especially when the earliest grants described the fishery as "ancient inheritance of the Crown."

Non-tidal Waters.

Rivers.

The general doctrine with regard to fishery in non-tidal waters is that the proprietor of the land abutting on the water's edge has the exclusive right of fishery as far as midwater—"*usque ad medium filum aquæ.*" Just as in tidal waters the right of fishing is *primâ facie* in the public, so in non-tidal waters the right is *primâ facie* in the lord of the soil; and the burden of proof in the former case is

thrown upon him who claims a private right exclusively, and in the latter on him who, not being the riparian proprietor, asserts an exclusive right in himself, or jointly with another or others. Thus it follows at once that if a single person own the land on both sides of the stream, he will have the exclusive fishing of the entire breadth of the stream, and his fishing ground will be bounded above and below by lines drawn across the current at the mearings of his property. This right of Several fishery is not such as will enable any particular landed proprietor to use any engine whatsoever which might enable him to take all fish and prevent any from passing either up or down stream. Each proprietor has the right to take what fish he may easily catch without using means which would prevent his neighbours from doing likewise in those parts of the river touching upon their lands. No owner will be permitted to build a stone weir across a river when under ancient deeds he was entitled to have one of brushwood only: *Weld* v. *Hornby*, 7 East 195 [1806]. An upper proprietor has the right to the full possession of the water in the same state in which he enjoyed it when the grant of a lower fishery was made; he has a right of free passage for fish from the sea, and all occupiers on the banks of the stream have similar rights: *Hamilton* v. *Donegall*, 3 Ridg. P.C. 267 [1795].

Although in the case of *Lyon* v. *Fishmongers' Co.*, 1 App. C. 662, it was affirmed that the right of fishery in streams arose merely from the fact of the lateral contact of the land and the water, still it may be considered that the right does not arise from that cause only, nor from the circumstance that the water is easiest of access for such proprietor—for all but trespassers are excluded—but by virtue of the proprietor's occupation of the soil under the running water, making such right in reality a profit of the land itself, for, unless there be circumstances

varying the case (*Devonshire* v. *Pattinson*, 20 Q.B.D. 263 [1887]), the boundary of a stream-washed close is the centre of the stream: besides the other theory can define no boundary to the fishery right which it affirms, and apparently recognises no property in the river bed itself. A riparian proprietor may grant his interest in the fishery to another. In such a case a Several fishery will pass; *à fortiori* if he grant both land and fishery; but if the grant be such as not to exclude himself, a Free or Common of fishery (as the case may be) will pass, and both grantor and grantees will hold together: *Bloomfield* v. *Johnston*, Ir.R., 8 C.L. 68 [1868]. From this it follows conversely that the possession of a Free fishery merely does not imply a right to the soil: *Holford* v. *Bailey*. 8 Q.B. 1016. That kind of fishery which the original occupier of the lands *primâ facie* holds, and which he may grant along with the lands, has been called a "territorial" or "territorial several" fishery, which term explains itself. A "several" fishery, merely, implies nothing, of course, with regard to contiguous land; indeed, a Several fishery has been defined by 13 & 14 Vict., c. 88, s. 1, to be such "a fishery in a person or persons, exclusive of the public, whether the soil covered by such waters be vested in such person or persons or in any other person or persons." One may assume, therefore, that where the terms of the grant are unknown (if there be a grant), and nothing predicated except that a given fishery is "several," the owner of such Several fishery is also *primâ facie* owner of the soil, though of course such an assumption might be easily disturbed: *Duke of Somerset* v. *Fogwell*, 5 B. & C. 875; *Marshall* v. *Ulleswater Nav. Co.*, 3 B. & S. 732; *Holford* v. *Bailey*, 8 Q.B. 1016; *R.* v. *Ellis*, 1 M. & S., 665; *Scratton* v. *Browne*, 4 B. & C. 845. Some of the foregoing cases go so far merely as to affirm that for the purposes of pleading, the allegation that a fishery is "several," will be sufficient

to carry the presumption of property in the soil. A much stronger presumption is the converse of this, viz., that the possession of land on a riverside gives a Several fishery; but even this one may be rebutted in many ways: *Dyer* v. *Rich*, Ir.R., 4 C.L. 424; *Devonshire* v. *Pattinson*, 20 Q.B.D. 263 [1887].

There can be no public right of fishery in non-tidal waters, even where they are to some extent navigable (in fact): *Pearce* v. *Scotcher*, 9 Q.B.D. 162. In rivers which are in fact navigable, but non-tidal, there exists from the nature of the subject-matter a public right of navigation, but not of fishing, for as one comes up stream the private right of riparian owners attaches and arises at the point where the tide ceases to influence the stream, *i.e.*, at the point where the river ceases to be technically "navigable."

If a stream slowly alter its course, what are then the respective rights in the several proprietors? The current must of necessity encroach upon the lands of one or other. Can the landowner from whom it recedes follow the stream? This point was considered in *Foster* v. *Wright*, 4 C.P.D. 438. There the encroachment was gradual upon the land of one riparian owner, and it was held that the other had still his right to follow the stream to the middle (compare *Miller* v. *Little*, *suprà*). The change laterally was so gradual that it was impossible day by day definitely to mark the movement: *de minimis non curat lex:* the stream was *quàm proximè* the same on each day as it had been the preceding day: and the rights in the river were held to be unaltered, though in the end the *medium filum* had very much more than merely touched upon the neighbour's lands. But, as we have seen above, the decision would not be similar, if the river were suddenly diverted over the land of a riverside proprietor. In such a case the stream could not be followed; his opposite neighbour's rights would end with the middle line of the dry river bed; in other

words he might fish no longer. The right of fishing in non-tidal waters goes to the occupier for the time being of the riparian lands; thus a lessee will have the right, unless the lessor have taken means to prevent the operation of this principle: *Graham* v. *Ewart*, 11 Ex. In *Corcor.* v. *Payne*, Ir.R., 4 C.L. 387, however, it was held that where the lease had not been executed by the lessee, the clause reserving the right of fishery could not operate as a regrant to the landlord of the incorporeal right. The right is void as an exception or reservation. Similarly the presumption is that the fishery (Several or Free) is in the occupiers of the land, and not in the lord of the manor: *R.* v. *Ellis*, 1 M. & S. 652. The giving of a fee-farm in Ireland under the Renewable Leaseholds Conversion Act does not affect the right to a Several fishery: *Hamilton* v. *Musgrave*, Ir.R., 6 C.L. 129.

It will be convenient to postpone for a moment the consideration of the very interesting and peculiar position of the law of fishery in large inland lakes; it merits special attention, and will be noticed at some length. In non-tidal waters—the matter of fishery in lakes being for the time reserved—there can be no Common fishery in the Public generally. This was the gist of the decision in *Murphy* v. *Ryan* (*suprà*). In a very recent case in the Court of Appeal, however, *Blount* v. *Layard*, W.N., 1888, 108, one is somewhat surprised to find some colour of suggestion that the public might not be excluded from fishing, if for years they had exercised that right in a non-tidal river touching plaintiff's close. The plaintiff was a riparian proprietor, and produced *primâ facie* title to adjoining estate and to a Several fishery. In defence to an action of trespass, it was proved that there had been an unopposed public custom of fishing in the *locus in quo;* and it was held that although such evidence could not establish the existence of a Common fishery, yet it might tend to the inference that the plaintiff

did not interfere because he knew, or at least supposed, the real title to be in some one else; and that the matter was one which was for the consideration of a jury. This is an extremely interesting decision, and there is no reason in the nature of things why it should be otherwise, for when the public good competes with a personal convenience, the former should prevail, other things being equal; and, *à fortiori*, in a case such as this, when the owner either did not know or would not assert his right; and the evidence tended all in one direction. However, we have here an expression of Judicial opinion to the effect that it would be permissible for the jury to come to the conclusion that a public Common fishery existed in non-tidal waters. If the report of this case be accurate, we have here the first step, so to speak, towards accomplishing in certain cases for rivers, what has for years been demanded with regard to lakes (and which will be treated more fully below), namely, a breaking down of the series of Several fisheries in non-tidal waters, and the recognition in them of a Common fishery, or Common fisheries. But it must be confessed that the decision just now referred to runs counter to the effect of previous decisions, such as *R.* v. *Justices of Kilkenny*, 14 Ir.L.R. 349 (1884), where it was held that a public right of fishing by mere user cannot be acquired in inland waters; and also the case of *Neill* v. *Devonshire*, 8 App. Cases, 158 (1882), where cot-fishing had been practised by the defendants as far back as living memory, with the knowledge of the plaintiff, in a non-tidal river; and it was held that if plaintiff's right to a Several fishery were once proved, the existence of cot-fishing could not take it away or confer any right upon the public; for the public cannot in law prescribe for a *profit à prendre in alieno solo* (see *Bland* v. *Lipscombe*, quoted in *Race* v. *Ward*, 4 E. & B. 713), nor acquire any right adversely to the owner under any statute of limitation; and an incorporeal

hereditament such as a Several fishery (which can only pass by deed: *Duke of Somerset* v. *Fogwell*, 5 B. & C. 875), cannot be abandoned. In *Shuttleworth* v. *Lefleming*, 19 C.B.N.S. 687, it was held, "that the 2 & 3 W. IV., c. 71, does not apply "to a *profit à prendre* in gross, *e.g.*, a claim to a free fishery "in the waters of another."

NON-TIDAL WATERS.

Lakes.

In these islands lakes are found generally as the expansions of our greater rivers; those which are land-locked being for the most part of such small size as rather to merit the name of ponds. As to the latter, little or no difficulty will arise with regard to the rights of fishing. The area of these sheets of water will be in most cases so small as to be easily included within the ambit of one property, or to constitute part of the boundary line between neighbouring proprietors. And there can be no question that under the existing state of the law the fishery would, in the former case belong to the owner or occupier of the circumjacent lands; and in the latter case either equally to both landowners up to the middle line (especially if the lake were narrow), or their rights of fishing would be divided, as to area, by a line drawn through the lake joining the boundaries at the points where they abutted upon the shore. But a great question is broached when it is asked:—What is the law of fishing in great inland seas such as Loughs Neagh, Erne, and Allen, in Ireland, and over smaller areas, as Windermere, Ulleswater, Derwentwater? Can it be that these great expanses of water are shut against the public right of fishery simply because the salt sea tide does not induce in them twice a day a periodic rise and fall? Authority answers, yes. Not without hesitancy and complaining some of the Judges have given their assent to this doctrine, or rather they have given their

Judgments with little real assent; but, bound by precedent and by the existing Common Law, some English and Irish Judges have struggled against the authorities by which in the end they held themselves guided, and in an unmistakeable way have expressed, as the following pages will shew, their individual opinions as to what ought to be the law, if it is not. It may be pertinently asked: What has the ocean tide to do with these lakes, as a reason for excluding the public from setting sail in their boats to catch what fish they might find? The further side of the lake from here is hardly visible; it is miles away: the water in storms is lashed into giant billows as of the ocean: can it be that A. B., who holds a little farm on the lake side yonder, possesses as well a Several fishery out to the middle of the lake? And the answer is: Most of the authorities say so, or, at least, affirm nothing to the contrary. And it is just because the ocean tide has nothing to do with the waters that down to the present moment, at any rate, the Crown has not successfully asserted its right to the soil of these lakes on behalf of a Common fishery for the public benefit.

In the South and East of England there are no great lakes. This seems to be the reason why no Common Law distinction has been recognised between the two great subdivisions of non-tidal waters, viz., great lakes, and comparatively narrow rivers: for the roots of our Common Law are deep in the Past, and there are many fundamental principles embodied within its system which were demanded, centuries since, by the necessities of the day and by the surroundings and legal relations of the people at that time, and have been fully and freely since then recognised, but which have now peculiar and far-reaching consequences. The rule that public right is bounded by the extreme limit of tide-water was inherent in our law when the population of England was as yet not over five millions; when the

northern hives of industrial life had not yet sprung into being; when London and Winchester and Bath were among the most important centres of our early English internal trade; when the agricultural districts of Kent and Surrey and Somerset and Hampshire attracted the busiest labourers of the plough and harvest field; when the Thames and Medway were pre-eminently *the* rivers of the time (sufficiently prominent indeed to be specially mentioned alone in Acts of Parliament); when Liverpool was a sleepy fishing village with its castle and a few straggling streets, when Manchester was a decayed, old-time Roman settlement which boasted only of its annual fair; and when the lake country of Cumberland and Westmoreland was so thinly inhabited and so much cut off from Courts and Justices that there never then was mooted a single question or difficulty regarding the right of fishery in lakes. It is more than probable—indeed it is almost certain—that the present position of fishery law (at least as regards lakes) would be very different, if the map of England shewed in the county of (say) Essex an inland lake of even a dozen square miles in extent. The difficulties which we now experience would then have arisen in the infancy of our Common Law, and would doubtless have been solved according to reason and right. But instead of this, the principle became fixed, written, commented upon, crystallised; and all the while the population kept rapidly increasing. Then after some years a lake-fishery question arose in England, as it must have done sooner or later, and in Ireland there arose fishery disputes regarding the great lakes in that island. But the law was found to be inelastic; and what, in the nature of things, must have been intended merely to define on rivers (as distinguished from ocean, or ocean-influenced waters) the public and private rights of fishery, has now the effect of completely excluding the public from fishing on our great lakes. Surely, the criteria ought rather to be size, and

navigability-in-fact, and, perhaps, absence of appreciable current sea-wards (that is on the assumption that every water with a continuous current must be taken, for the present, to partake so much of the nature of a river as to be governed by the "*medium filum*" doctrine).

The difficulty which during the last thirty-five or forty years has been felt in England and Ireland regarding the rigidity of the Common Law as to inland lake fisheries was experienced very early in the present century in America, both with regard to rivers and lakes. It will be convenient, then, to digress for a moment to refer to the workings of English Law in reference to the fisheries of the American Continent, in order that some light may be thrown upon the present question. Law generally ought to conform to the necessities of the people and the age, and laws dealing even indirectly with real or personal property ought to adapt themselves to the physical characteristics of that property. Chief Justice Hale in his* "Considerations Touching the Amendment of Lawes," in reference to those who have a "superstitious veneration for ancient lawes," says:—"They tenaciously and vigorously maintain the very forms and proceedings and practices, which, though possibly at first they were reasonable and useful, yet by the very change of matters become not only useless and impertinent, but burthensome and inconvenient and prejudicial to the common justice and the common good of mankind, not considering the forms and prescripts of lawes were not introduced for their own sakes but for the use of public justice, and therefore when they became insipid, useless, impertinent, and possibly derogatory to the end, they may and must be removed." First then with regard to running waters in America. The lawyers found themselves in a country possessing rivers such as the Ohio, Missouri, Mississippi,

* *Hargreave's Tracts*, Cap. III.

which swept along for hundreds and thousands of miles. Were the citizens not to be permitted to have a public right in such gigantic waters? Some answered: No. We must follow at all hazards the English Common Law (which, on the severance from the mother country, most of the States had taken as the basis of their Municipal Law). Others retorted: We will not and cannot be bound by such old-fashioned rules; common sense forces us to disregard them; our rivers are not the narrow streams of thirty or forty miles long which are found in England, and with reference to which these laws were first established. So in the Southern States the Courts soon avoided, so to speak, the dead-lock, by determining once for all that the riparian proprietor's right in large rivers stopped at low-water mark, the State itself, for the public, having the right to the bed of the river. These streams, though not, in the legal sense, navigable, but being in reality large and eminently navigable in fact, were to be deemed navigable in law so as to exclude the doctrine of "*usque ad filum medium.*" (Angell, p. 753.) In Indiana the riparian's property goes down upon the Ohio shore only to low-water mark.* In Pennsylvania the same would appear to be the case;† as it is also in South Carolina and Tennessee. Tilghman, C.J., in 14 *S. & Rawle*, 71, said: "Many of our rivers such as the Missouri, Ohio, Alleghany, and Susquehanna, are all public highways, and whether if such river existed in England, the rule of the Common Law might not have been different, may certainly admit of a question." In *Goodwin* v. *Thompson*, 55 Am. Rep. 410, Cooper, J., says: "The public use of our navigable rivers imperatively requires that the soil under the water should be in the State in trust for the public." The movement in the Southern States, as is well known, has been more in conformity with the Civil Law. But,

* *Bainbridge* v. *Sherlock*, 7 Am. L.R., N.S. 70.

† *Flanagan* v. *Philadelphia*, 47 Penn. St. 229.

generally speaking, in the Northern States the Common Law of England still governs the fishing rights, so far as the rivers are concerned. In these States, therefore, the position of river Fishery Law is similar to that of lake Fishery Law in England; that is to say, an anomalous, hesitating position —one, so to speak, of quasi-transition; for the Courts, both here and there, have acknowledged that a change in the law might at least be not undesirable; but, on further consideration, and for the sake of "uniformity," have allowed matters to stand as they are, and have hugged the ancient doctrine as if it were loveable by reason of its antiquity. "*Vetera extollimus, recentium incuriosi.*"

That there is a right in the public or State to the bed of Lakes in America is affirmed even more strongly. Many of the Northern States, too, which strenuously refused to disregard English Common Law with regard to *rivers*, here join hands with their Southern neighbours, and give the soil (and so the fishery) of the lakes and their islands to the State or public, *e.g.*, the State of New York: *Canal Commissioners* v. *People*, 5 Wend. 423; State of New Hampshire: *State* v. *Gilmanton*, 9 N.H. 461. And in Vermont it was held that "lands bounded on lake Champlain extended to the edge of the water at low-water mark, and that this was so even with regard to the lands bordering on a creek or narrow arm of the lake"—for the interesting reason in comparative law (compare "tidal estuaries" as "branches of the sea")—"where the waters rose and fell with those of the lake": *Fletcher* v. *Phelps*, 28 Vt. 257. Where land is conveyed bounding on a lake or pond (if natural) the grant extends to water's edge at low-water: *West Roxbury* v. *Stoddard*. Great ponds in Massachusetts, over ten acres in extent, which were not before 1647 appropriated to private owners were by a Colony ordinance of that year made public; which included the right of fishing. The distinction taken in America

between a stream and a pond (or lake) is that "in one case the water has a natural motion—a current—while in the other the water is substantially at rest; and this is so independently of size." And it may be interesting to note here the result of American Law as regards grants and to compare with the English: "The right of grantee to take to the middle of the stream is grounded on the presumption that the grantor intended the grantee so to take; not that the bed of the stream passes as appurtenant to the bordering land, which cannot be; for a conveyance of one acre of land can never be made to carry another acre by way of incident or appurtenance to the first."—*Am. Rep.*, p. 579 (1888).

But do riparian occupiers in America never possess the soil in the bed of lakes? If so, when? and what is the test? In the N. Carolina case of *Hodges* v. *Williams*, 59 Am. Rep. 1887, we have a suggestion of the criterion. Here was a lake, 15 miles long by 8 miles broad (*i.e.*, more than 50,000 acres)—and thus from its size apparently more than sufficient to attach public right to the soil; but it was only 3½ feet deep—a sort of morass or swamp with, so to speak, a mere skin of water—and it was held that, *not being in fact navigable* by boats of even moderate size, it was, so far as the soil was concerned, in the grantee of the State; and moreover the case of *Broadnax* v. *Baker*, 55 Am. Rep. 633, was here explained to be: "Whenever water-courses have capacity to float freight and passenger boats, whereby they become channels or highways of commerce, the right to use them as such becomes paramount to any rights of a riparian owner."

By means of this short digression it will be readily seen how English Common Law has been construed across the Atlantic, and altered or disregarded to suit certain circumstances—how in fact, in the Evolution of our Law, the offspring has adapted itself to its circumstances and

surroundings. To return now to the state of matters at home. It is perfectly plain that the phrase "non-tidal waters" is sufficient to cover any inland lake, however large; and the great preponderance of authority, as the foregoing pages shew, is to the effect that no waters coming under that designation are subject to the public right of fishing. The divisions recognised have not been "lake," "stream," "sea;" but "tidal" and "non-tidal:" and so lake questions have been solved by the principle already spoken of, *i.e.*, lake *quà* "non-tidal water," not *quà* "lake." Three great-lake cases have been decided during the last thirty years: in order they are: *Marshall* v. *Ulleswater N. Co.*, 3 B. & S. 740, in 1863; *Bloomfield* v. *Johnston*, Ir.R., 8 C.L. 68, in 1868; and *Bristowe* v. *Cormican*, Ir.R., 10 C.L. 400, in 1874; the two latter cases being Irish cases, and the last-mentioned being carried afterwards to the House of Lords. The lakes in question were Ulleswater, Lough Erne, and Lough Neagh respectively. It is sufficient to say that all the Judgments, in avoiding to affirm that a public right of fishery might be, or is, recognised at law in these lakes, were simply carrying out the well-established "non-tidal" principle. But although this is so, it will nevertheless be presently seen that the tendency of the Judges was, in most cases, to restrict the operation in lakes of the doctrine of the "*medium filum*"—thus making a decided advance towards what one day may be a final Judicial separation of the two great classes of non-tidal waters, if such a result be not anticipated by Statute. In other words, though the Courts did *not* categorically decide that the right of the Crown (*i.e.*, the public) ought to prevail over the greatest part of these lakes, yet many of the Judges thought it somewhat astounding that a riparian proprietor of a few acres on the shore of a lake should have as a matter of right a Several fishery as far as the centre of the lake over a rectangular area of water of the uniform breadth of his holding at the

water's edge. And it is natural that any person should wonder at this doctrine; for over and above the peculiarities and difficulties of the "*medium filum*" theory as applied to lakes, and mentioned in the Judgments, there are, it would seem, certain physical difficulties which will appear on a moment's consideration. A river runs northward through a lake, that is, entering on its southern shore; the lake is narrow and long, and lies N. and S. Which are the riparian proprietors who by supposition have each a Several fishery to the middle thread? "The land occupiers on the E. and W. shores; and the middle thread lies N. and S." Now, suppose the lake is as broad as it is long. Who are now the owners of Several fisheries, and in what direction does the thread lie? And, under the present law, the answer must be, "The same as before." What, then, becomes of the riparian proprietors on the N. and S. shores of the lake? They are either excluded altogether, or they take to the centre of the lake. In the latter case, then, there must be *two middle threads* cutting, let us say, at right angles, and the rights of Several fishery are inextricably mixed. Or, on the other hand, an entirely new principle must be fixed upon, such as that each proprietor takes a sector-like portion of the lake, whose apex is at a central point, in order to give each his proportional right; for there is no reason why one should have a fishery to the exclusion of his neighbour. This would seem an insuperable objection to the applying of this theory to lakes. But it might be urged that generally lakes lie narrow and in valleys. True; but the difficulty of satisfying each proprietor would almost invariably arise, *i.e.*, in cases where the lake is too large to be enclosed by a single property; and taking for instance the extreme case of Lough Neagh (which lies in an irregular rectangle), we have on the N. and S. shores, proprietors who east or west of the *medium filum* (which

for convenience will be supposed to run N. and S.) have lands abutting on the lake for some miles.

In *Marshall* v. *Ulleswater N. Co.*, the issue was primarily one of navigation and piers. But, Wightman, J. (speaking for Mellor, J., and himself), used these words: "Whether the soil of lakes, like that of fresh water rivers, *primâ facie* belongs to the owners of the land or of the manors on either side, *ad medium filum aquæ*, or whether it belongs *primâ facie* to the King in right of his prerogative, it is not in this case necessary to determine"—this being the first important suggestion of its possibly belonging "*to the King*." In *Bloomfield* v. *Johnston*, regarding Lough Erne, it was held (*a*) that the soil of the lake by the grant in question (Free fishery) did not pass *ad medium filum* of the lake; (*b*) that the grant of a Free fishery is a grant non-exclusive; and (*c*) that "the public have not a common of fishery" (*qu.* Common fishery?) "in large inland lakes in which the tide does not flow, though navigable." Whiteside, C.J., after quoting Judgment (*suprà*) in *Marshall* v. *Ulleswater*, said: "I am not prepared to extend the presumption that the bed and soil of a stream belongs to the riparian proprietors *ad medium filum aquæ* to a large inland lake like Lough Erne." O'Brien, J., said: "The presumption that a riparian proprietor is entitled to the adjacent subaqueous soil of non-tidal waters along with his land may be rebutted, and in my opinion such presumption is rebutted by the facts and documents before us." In *Bristowe* v. *Cormican*, Palles, C.B., said, with reference to the question whether the meaning of the word "navigable" (in law) were the same as that of "tidal": "If it were now open to us to consider that question unfettered by authority, I should deem it one which would require very grave consideration. The very question was decided in *Bloomfield* v. *Johnston*. This judgment is a decision that *primâ facie* the public common

fishery does not exist in non-tidal waters: and is in this Court a conclusive authority." Dowse, B., said: "Some day or other I hope it will be decided, namely, whether the law as to inland lakes and inland seas is the same as the law with respect to rivers, and whether the word 'navigable' in one case is the same in law as the other. In the present case we follow the judgment in *Bloomfield* v. *Johnston*." In the same case in Exchequer Chamber, Lawson, J., said: "I confess I shall not regret if this case be taken to the House of Lords, for we then shall have their decision upon the right of the public in navigable non-tidal waters." Fitzgerald, J., too: "The question as to whether there can be a common public right of fishery in such an inland sea as Lough Neagh will be proper for the determination of the House of Lords: but I desire to add that whatever be the effect of the decision of the Exchequer Chamber in *Bloomfield* v. *Johnston* the Judges who composed the Court did not all intend to affirm the decision of the C. P., viz., that the public could *not* have a common fishery in large inland navigable freshwater lakes." Whiteside, C. J.: "The liberty of fishing . . . . common right . . . . does not exist in inland seas because the water is not salt —an arbitrary rule repugnant to reason, convenience, and the common sense of mankind! This question should now be thoroughly investigated and decided according to analogy and reason by the Court of Appeal. Why should not the right of fishing in this inland sea be enjoyed and exercised by the public as the right of passage for trade?" But, strange to tell, the very point at issue above was not before the House of Lords on Appeal—a fact to which Lord Cairns refers in these words: "Against the order over-ruling the demurrer the respondents have not appealed. My Lords, I mention this in order to shew that it does not appear to me that your Lordships can decide whether the replication to which I have referred was or was not a valid

defence at law." Lord Blackburn said: "It does not seem very convenient that a proprietor of a few acres fronting on Lough Neagh should have a piece of soil many miles in length tacked on to his frontage." In *R.* v. *Burrow*, 34 *Justice of Peace*, 53, on an Appeal from a conviction of one of the public for fishing in Ulleswater, Cockburn, C.J., dissented from the general principle that all non-tidal waters are non-public.

From the foregoing considerations, it will be seen that a change in the law of Lake fisheries is demanded. With reference to rivers the law may well stand as it is; our streams are narrow, and the public have not to any appreciable extent asserted a claim to the bed of running waters. If it were determined once for all—and it would be a mere matter of fact and measurement—what is the breadth, at the point of leaving or entering, of the broadest river passing through any lake in England or Ireland: let us suppose it is 150 yards:—if now it were enacted that in all non-tidal waters, navigable-in-fact (*i.e.*, following American decisions), the right of riparian owners to the water bed (and so of fishery) were limited to a uniform distance from the water's edge of 75 yards—that is half the above ascertained maximum width—(any waters of under 150 yards being regulated by the "*medium filum*" doctrine)—and all the remainder of the water-bed vested in the Crown for the public, provided always that all rights of Several fishery which have at present an ascertained and recognised legal existence should be preserved:—we should by such an enactment leave all the rivers unaffected, and have the lakes virtually given to the public, although, as will be seen, a considerable fringe of lake-water would be in reality subject to riparian Several fisheries. Of course the more logical method would be to measure the width of this lake-supplied river at the point where the ocean tide ceased to manifest itself, and set off half this breadth from

all non-tidal shores, the bisection of the overlapped area in all narrow waters furnishing us with the original "*medium filum*"; but the former would be the more practical method. There would thus be many thousand acres of inland sea thrown open to the public, over which now riparian owners have, at any rate, a nominal claim. And the limit could be fixed from low water mark—for lakes have their winter and summer levels. It might naturally be objected that such subjects ought not to be dealt with by measurements of chain or tape-line, but to be determined by such general words as "lake" or "river" or "pond;" and that afterwards complicated questions of trespass would be constantly arising, and that proof of breaking and entering by the public would be difficult. But the reply might well be: Conservators and Inspectors now under Statute are accustomed to lay off distances by yards and quarter miles from the mouths of rivers and elsewhere; the difficulty could arise only with regard to lakes: and as to the latter objection, it might be urged that even now the trespass upon an existing Several fishery presents the same difficulty of proof; besides, Conservators would have the superintendence, and where a difficulty might arise, a remedy would presently be provided.

W. H. BROWN.

III.—THE DESCENT OF THE MAR ESTATES.

IN an Article entitled *The Mar Peerage and Estates,* in the November number of this *Review,** Mr. Alexander Robertson aims at proving:—

1st, that the Report of the Committee for Privileges of the House of Lords as to the Mar Peerage in 1875 was founded on gross and serious errors;

2ndly, that these errors have not been wholly removed by an Act of Parliament passed in 1885;

3rdly, that the decision in the Court of Session as to the Mar Estates in 1873, affirmed in the House of Lords in 1876, was conformable to the Law of Scotland.

As an old lawyer who has watched both cases from their beginnings and carefully studied their mutual relation, I would offer some remarks on the third proposition advanced by Mr. Robertson, the first two seeming to me to require no further affirmation.

To Mr. Robertson's third proposition I demur, and I propose to state reasons for demurring.

The decision in the Court of Session was upon a claim pursued under heavy disadvantages. The pursuer was forbidden to appear as Earl of Mar, although he had acquired that status conformably to the Law of Scotland. The Mar Charter Chest being closed to him, he was unable to state his case properly and fully; for that case was to shew, first, the intent of the Entail, secondly, a suitable construction of the disponing words; and no doubt the chest contained and still contains documents illustrating both these points.

* *Law Magazine and Review,* No. CCLXX., for November, 1888. Art. *The Mar Peerage and Estates.* By ALEXANDER ROBERTSON, M.A.

"It was customary in Scotland," wrote the late Earl of Crawford,* "for the King, on attaining majority, to pass an "Act revoking grants or actions done in his name during "the recent minority in prejudice of the interests of the "Crown or against public justice and morality. The "diversion of heritage from the heirs general to the heirs "of provision or entail was usually included in these "revocations, as done in violation of natural justice and "law. I may refer to the revocation by James III. "4th July 1476 of 'omnes tallias a legitimis heredibus per "'eum factas;' that by James IV. 26th June 1493 of 'all "'tailzies maid fra the airis generale to the airis maill of "'ony landis in our realme;' that by Queen Mary 20th June "1555 in the same terms with the additional qualification "'aganis the law and gude conscience;' and by James VI. "29th July 1587 with the still further addition 'quhair "'the saidis landis were disponit befoir to the airis quhat- "'sumever, and the saidis infeftmentis changeit be resig- "'nation in the same persoun and to his airis maill.' These "revocatory enactments may show that the descent was to "heirs general as the rule at common law, and that pro- "visions to heirs male were viewed as exceptional and to "be discountenanced; the presumption therefore being "necessarily in favour of the rule and against the exception."

Queen Mary's Charter of the Earldom of Mar, and the series of later Charters of it during the Stuart reigns, formed such a case as the revocatory enactment of King James VI. had in view.

There were six Earls during this period; but the Charters to the last only are important here, because he was the real author of the Entail now under consideration.

John, Earl of Mar, having come of age and sat in Parliament in 1696, obtained a Charter, dated the 10th March,

* *The Earldom of Mar for Five Hundred Years in Sunshine and in Shade.* (Lond. 1882.) I. 110.

1698-9, 10 Will. III., disponing the Mar Estate as it stood disponed in his father's time, namely, "*heredibus masculis ex* "*ejus corpore quibus deficientibus heredibus ejus masculis quibus*-"*cunque quibus deficientibus heredibus suis et assignatis*;" under which disposition he was infeft on the 9th of May following.

On the 6th April, 1703, he married Lady Margaret Hay, then under seventeen years of age. She had one child only who survived infancy, Thomas, Lord Erskine; and she died on the 25th April, 1707.

A few days later, the Union of Scotland and England took effect, and a few months later, John, Earl of Mar, sat as a Representative Peer of Scotland in the Parliament of Great Britain.

On the 6th November, 1713, John, Earl of Mar, gave a Procuratory of Resignation, containing the following words:—

"Be it known to all men by these present Letters us "John Earl of Mar Lord Erskine Garioch and Aloa, &c., "one of her Majesty's Prinll. Secretarys of State, Foras-"much as upon certain grave and weighty considerations "us thereunto moving we are resolved to make resignation "of our whole estate and Earldom of Mar in the hands of "our Superiors thereof for new infeftment of the same to "be granted back again by them to us and after our "decease to Thomas Lord Erskine our only lawful child "on life and his and our other heirs particularly and "generally after mentioned," &c., signed before "Master "James Erskine of Grange one of the Lords of Session and "Lord Justice Clerk our brother german."

This Instrument was accompanied and followed by others carrying out the intent, as the Mar Charter Chest would doubtless shew.

On the 20th July, 1714, the Earl married his second wife, Lady Frances Pierrepont, then about thirty-three years of age. She, too, had one child only who survived infancy, Lady Frances Erskine.

A few days after this second marriage of the Earl, the death of Queen Anne brought the Stuart dynasty to an end. In Scotland the succession of King George provoked, first, disaffection, then rebellion, in which the Earl took part. The Parliament of Great Britain passed an Act attainting him as from the 19th January, 1715-6, and so brought his estate under forfeiture.

As an exile on the Continent, he soon recognised the hopelessness of the Stuart cause, and began to treat, through his brother, with the British Government for pardon. In the meantime his brother was permitted to purchase the forfeited Mar Estate for the purpose of re-settling it upon the Mar family. From 1721 to 1729 the Earl, resident in Paris, corresponded with his brother upon a re-settlement designed to replace the succession which had been cut short by the forfeiture.

The purchase, made in the sole name of James Erskine, was imparted equally to David Erskine by a Deed of Assignation, dated the 23rd March, 1725, and the re-settlement was expressed and secured by the Bond of the two purchasers, written on the back, and bearing the date, of the Deed of Assignation. The obligation of this Bond was to dispone the estate described in the Deed, "to and in "favours of Thomas Lord Erskine and the heirs of his "body whom failling to any lawful sister of the said "Thomas Lord Erskine and the heirs of her body whom "failling," &c., "under the provisions and conditions "therein mentioned and underwritten."

At the date of this Deed and its Back-Bond, Thomas, Lord Erskine, was yet under age, and his only sister, Lady Frances Erskine, was not more than ten years old; and both were probably at Paris with their father, who still nourished hopes of returning home. But his earnest wishes, refused by the Ministers of King George I., were still refused by those of King George II., who

succeeded in 1727, and the "late" Earl of Mar died abroad in 1732.

From this narrative it appears that the Mar Estate was thrice disponed during the life of John, Earl of Mar,—twice during his tenure, and a third time during his forfeiture and exile, but under his direction,—first in 1699, during his earlier unmarried life, to his heirs male; secondly, in 1713, while he was a widower with an only child, to the heirs of that child and of himself, as particularly described in instruments of about that date, now hidden in the Mar Charter Chest; thirdly, in 1725, to the heirs of the same child and to the heirs of any sister of that child, as particularly described in the Back-Bond of that date.

The Disposition of 1699 had placed the Estate in danger of permanent detachment from the Dignity, and a sense of this danger was among the "grave and weighty considera-"tions moving" the Earl to the Disposition of 1713, which seems to have provided against it. A sanguine hope that the attainder would be reversed, if not in his own time, at all events in his children's time, moved him to seize eagerly the opportunity offered in 1725, by his brother and his cousin, of restoring in substance the interrupted Disposition of 1713.

James Erskine and David Erskine fulfilled their Bond in favour of his two children by the Deed of Entail of the 6th January, 1739.

A general intent to attach the Mar Estate prospectively to the Mar Dignity,—as the Dignity was then universally understood,—pervaded the Deed of Entail, and was effected by its disponing words, which were these: "to "and in favours of the said Thomas Lord Erskine and the "heirs male lawfully to be procreate of his body whom "failling to the heirs whatsomever descending of the said "Thomas Lord Erskine his body whom failling to Lady

"Frances Erskine his sister and the heirs male to be "procreate of her body whom failling to the heirs "whatsomever descending of her body whom failling," &c.

Let us not be tempted to compare this Entail of the Mar Estates with entails of other family estates. The best interpreter of an Entail is itself. The apparent resemblances to others are partial and deceptive. It is improbable that any two family entails should be alike either in intent or in language; highly improbable that they should be alike in both. So far as I can learn, the Mar Entail stands alone in both respects. Its singular intent was effected by singular language. Its intent is to be gathered from its history and from the general purport of its provisions; its effecting language is to be construed, not merely word by word, but as a whole in which every clause takes its proper place.

What did the disponers mean by the expression "procreate" as applied here to prospective heirs male? Its meaning as given in a law-dictionary or apparent in another conveyance is little to the purpose. What was its meaning in *this* disposition to heirs male "procreate," whom failing to heirs "descending,"—a distinction being thus drawn between "procreate" and "descending"? If no distinction of meaning was intended, why did the two learned Scottish lawyers who settled and executed the Deed use two distinct expressions? Why did they not rather use either "procreate" or "descending" in both places? If a distinction of meaning was intended, no solemn precedent need be cited in aid. Primarily, "procreate" of a person describes the first generation from that person, and therefore, *where contrasted with "descending,"* it comprises the first descending step only. Here there is no room for extending this meaning further.

Accordingly, the "heirs male procreate" in this disposition were to be persons fulfiling the double condition of being

both "heirs male" and "sons." There was no mention of heirs male who were not sons, nor of sons who were not heirs male. Further, the disposition to heirs male "procreate" was not followed by one to heirs *male* "descending."

The disponers intended the "failing" of each class of heirs to bear its usual meaning, namely, the want of any person answering the description of the class. They also intended that on every "failing," Thomas, Lord Erskine or Lady Frances Erskine was to be resorted to as the *stirps* or root of the next succession—that descent was not to be traced *from* any heir of either.

The death of John Francis, Earl of Mar, was the "failing" of "heirs male procreate" of Lady Frances Erskine. John Thomas and John Francis Miller, Earls of Mar, succeeded really as her "heirs descending."

In the proceedings before the Court of Session in 1873, the pursuer, pleading under the disadvantages above-mentioned, argued that "procreate" was used in its primary sense, and that the "heir descending" had become entitled to succeed. The defender argued that "procreate" was used in its secondary sense, and that the heir male, however distant from the *stirps*, had become entitled to succeed.

The prevailing impression that this contest was merely between the heir general and the heir male upon the meaning of a single sentence in the Deed of Entail of the Mar Estates, is totally incorrect as an adequate representation of the case. The pursuer showed that the intent of the Deed to join the Mar Estates to the Mar Dignity if restored was clear, and that its fulfilment by the disposing words rightly construed was equally clear. The defender, keeping out of sight the intent of the Deed, and also his pending claim as heir male through the husband of Lady Frances Erskine, to a Mar Dignity previously unheard of, set up a claim as heir male of Lady Frances Erskine herself, to the Mar Estates. In effect he alleged

that the ancient Mar dignity descended in one line, the Mar Dignity propounded by himself in a second line, and the Mar Estates in a third line, the last being a line of commoners for whom no Mar dignity was yet propounded ! How, on this construction of the Deed, such terms in it as "heir female" and "nearest heir," and the terms connecting the Mar Estate with the Mar Dignity, were to be accounted for, he did not condescend to explain !

The Court, having already treated the ancient Dignity as in suspense, if not extinct, could not give due weight to the intent of the Entail, and in fact disregarded the intent altogether. Further, it did not attempt to construe, "procreate," and "descending" so as to give due effect to each; but, in spite of the contrast made between them, declared the former to be co-extensive with the latter. Accordingly its decision was for the defender. Was this decision, in such circumstances and on such grounds, conformable to the Law of Scotland ?

When, in 1876, the pursuer's appeal came on for hearing before the House of Lords, the circumstances of the time increased the weight of his disadvantages. The Report of the Committee for Privileges had been accepted and acted upon by the House, but its meaning in an important respect was yet uncertain. The Lords had not yet agreed among themselves whether the Report affected the ancient dignity or no. In this dilemma they seem to have adopted, from the late speech of one of themselves, the wonderful conclusion that "the ancient Earldom had come to an end in some way or other," for they not only ignored its existence, but attempted to strike it from the Roll of Scottish Peerages which was accepted at the Union as authentic, and thenceforth until 1885 they treated the heir, whose inheritance of it had already been legally clothed with possession, as a commoner. Of course, therefore, they were less inclined to look at the intent of the Entail than even the Court of

Session had been. In giving judgment, the three lords who had taken part in the Peerage Case did not refer to the Report of 1875 as bearing upon the right to the Estate, while the fourth, Lord O'Hagan, supported his opinion by attributing to that Report a meaning which the House of Lords has since carefully repudiated!

The Report of 1875 was one of the most unhappy, in respect of the House of Lords, that was ever presented. It grievously offended a large proportion of the Peers, especially those of Scotland. It has led to a long series of irritating disputes and inconsistent Resolutions, not only at Westminster but also at Holyrood. It has evoked a special Act of Parliament, in some respects almost as unhappy as itself. But there is yet hope that the House may find means, consistent with its high sense of honour and justice, its calm wisdom, and its venerable traditions, for bringing the long-pending controversies upon the Mar Peerage and Estates to a fair and reasonable conclusion.

H. S. MILMAN.

IV.—FOREIGN MARITIME LAWS: II.—ITALY.

MERCANTILE MARINE CODE.

CHAPTER V.

Of the Payment and Apportionment of Prize Money.

ART. 228. If the Prize Commission has pronounced a sentence for the sale or forfeiture of the prize, the Maritime Authority, having first issued the customary advertisements and given notice to those concerned, will proceed to a public sale, and will place the proceeds in the Seamen's Deposit Bank [*Cassa dei Depositi della gente di mare*].

Cf. The Naval Prize Act, 1864 (27 & 28 Vict., c. 25), §§ 18, 29.

229. The proceeds, less the law expenses and those of the payment out, will be apportioned as follows:—

If the prize be made by a man-of-war, one-fifth will be put aside for the benefit of the Mercantile Marine Sick Fund and used in the manner prescribed by the Regulations; two-fifths will then be distributed amongst the crew or crews (engaged), in the shares which shall be established by Royal Decree, and the residue will be incorporated with the Public Revenue.

If the prize or capture is made by privateers or merchant men, the one-fifth will be put aside for the benefit of the Sick Fund, and the residue apportioned in accordance with the fitting-out agreement and ship's articles.

Failing any agreement, one half of the four-fifths (two-fifths) will be considered the share of the crew or crews, and the other half that of the owners; the first half will be distributed in the manner established by the Regulations, and the second in proportion to the respective interests of the owners.

In Great Britain the crews of men-of-war get the whole proceeds, less law costs, and 7½ per cent., 5 per cent. of which goes into a general fund, and 2½ per cent. to the agent. Naval Agency Act, 1864, §§ 13, 17, 19.

In the case of privateers it would no doubt be agreed between owners and crews how they should share, but in the case of non-commissioned captors or re-captors, the Court of Admiralty looks favourably on the persons actually engaged, but there is no hard-and-fast rule of distribution (*The San Bernardo*, 1 C. Rob. 178; *The Two Friends*, 1 C. Rob. 285), and such captors have no claim on the captured property, it being a droit of Admiralty (27 & 28 Vict., c. xxv., § 39).

230. Nothing is set aside for the benefit of the Sick Fund from the sums given under the name of salvage by Arts. 220, 221, 222.

In England, prize salvage (and civil salvage to men-of-war) is subject to the same deductions as other prize money, §§ 17, 18, Naval Agency Act, 1864, for which see note to Art. 229.

231. National vessels of war in sight when a prize is made by a merchant vessel have a right to a fourth of the

value of the prize; the other three-fourths enure to the benefit to the capturing vessels.

For the purpose of proving his presence at the engagement, the commander must enter the fact in his log, stating the day and precise hour at which the different incidents of it happened, especially the surrender of the prize; and shall specify besides, the geographical position of the place in which the things happened, and all other circumstances relating to it.

In British Prize Courts men-of-war in sight are deemed to be co-operating in the capture, for that is their duty,—unless it can be proved that in fact they had no such intention,—and so share on equal terms and payment of proportion of expenses. Phillimore, *Int. Law*, Vol. III., § 389 B. Cf. 27 & 28 Vict., c. 26, § 36.

232. Privateers in sight at a capture made by another privateer or merchantman, and which have tried to assist, have a right to one-half of the share which would have been theirs had they actually taken part in the engagement.

In this case the captain must, in addition to the declarations mentioned in the preceding article, also state the manœuvres he executed to close with the enemy.

Under such circumstances a privateer would take her full proportionate share, but she must prove that she actually co-operated, as there is no such duty laid on her as on vessels of war. See note to previous Article, and Phillimore, *Int. Law*, Vol. III., §§ 387-389.

233. Privateers and merchantmen in sight at a capture by a man-of-war have no right to any share in the products of the prize.

Nevertheless, if they take part in the engagement, or in preserving the convoy whilst the man-of-war is engaged, they have a right to be remunerated out of the products of the prize in proportion to the service rendered, which will be determined by the Minister of Marine. Whenever such privateers or merchantmen are required by the Commanders of ships of war to assist them against the enemy, they have a right to the prizes that are made in proportion to the numbers of their crews, without prejudice to whatever

indemnity may be due to them for damages they have sustained.

As to the privateer, it makes no difference whether the actual captor is a man-of-war or another privateer; she will be entitled to share if actually co-operating. The uncommissioned merchant ships have no *right* to prize money in any event. See note to Art. 229, *ante*.

234. If it happens that one or more ships are detached from a fleet, squadron, or division at anchor, to cruise or for other operations of war, and that these latter make a prize in sight of the fleet, squadron, or division, then one-third of the amount reserved for the crews is set aside for the actual captors, and the other two-thirds are distributed amongst all.

If the fleet, squadron, or division is under way and in sight, the prizes, whether made by the detached ships or by the fleet, squadron, or division will benefit all alike.

If the squadron or ship is really engaged in detached service, the fleet will not share; but, if still acting in connection with the fleet, they will, according to the Law of British Prize Courts. Phillimore, *Int. Law*, Vol. III., § 398. See *The Arc-en-Ciel*, Marsden's *Ad. Cas.* p. 171, *The Touraine*, *Ibid*, 169.

235. When a prize is made by a man-of-war detached from the fleet, squadron, or division to which it belongs, and out of sight of the same, there will be assigned to the Commander-in-Chief, and to the officer of highest rank of the fleet, squadron, or division, one-half of the share to which they would have been entitled in accordance with their rank if the prize had been made in sight of the fleet, squadron, or division.

See note to Art. 234. British flag officers, under the proclamation of May 19th, 1866, divide one-thirtieth of all prize-money arising from captures made by ships under their command, but the principle does not apply to captures from a destruction of pirates, nor to civil salvage awards, but it dces to slave-trade captures.

236. If the capture be made by a battery or fortress of the State, the rules prescribed for prizes made by men-of-war are applicable.

Whenever a prize is made by a merchant vessel within range of the guns of a fortress or battery on the shore, and the latter has fired on the enemy, the prize-money will be divided as if three-fourths were owing to the naval operations and one-fourth to the fortress or battery.

In Great Britain the law of prize does not apply to land forces at all, but if a grant of bounty is made to land forces, it falls within the jurisdiction of the Prize Court, 3 & 4 Vict., c. 65, § 22, and also when a capture of Government property is made by joint naval and military forces, 27 & 28 Vict., c. 25, § 34. See *The Dordrecht*, 2 C. Rob. 55; The Banda and Kirwee Booty, L.R. 1, Ad. & Ecc. 109; The Army of the Deccan, 2 Knapp 114. Twiss, *Law of Nations*, *War*, ch. iv., § 71.

237. Any person who is sent away on duty from a captor, continues to be considered as part of her crew, and will share in any prize that is made as if he were on board at the time.

It appears from § 42 of the Prize Act, 1864, that only those actually present share in the Bounty allowed for capture of a man-of-war, whilst those absent on duty would also share in the proceeds of merchant prizes. Prize Proclamation, 1886.

238. The heir of a person who dies during an engagement from wounds received in the same, has the share of prize-money which would be due to the person he succeeds.

239. Persons landed on account of illness or wounds received in battle have a right to one-half shares in prizes made after they are landed, so long as they remain a part of the crew of the captor.

See Note to Art. 237.

240. On the completion of the proceedings referred to in Art. 228, the Authority there mentioned will transmit all matters to the President of the Prize Commission.

One of the Commissioners will be appointed by the President, and will draw up a statement of the apportionment of the prize or forfeiture, and will order it to be published in the Official Gazette of the Realm.

Cf. Naval Agency and Distribution Act, 1864, §§ 13—18, 21.

241. Objections to the scheme of apportionment must be made within a month from the decision of the Commissioner.

242. The shares of prize-money which are not claimed by those who are entitled to them, within four years, commencing from the day on which the scheme of apportionment is published, will go to the benefit of the Sick Fund.

Under the former Prize Acts, unclaimed prize-money was after 6 years paid over to Greenwich Hospital, but could be recovered on good cause being shewn; at present by § 17 of the Naval Agency Act, 1864, it is paid over to the Naval Prize Fund, and then, at discretion, to the Consolidated Fund, and, apparently, on good cause shewn, may be recovered at any time.

CHAPTER VI.

*Of Reprisals (Rappresaglie).**

243. Merchant vessels of a hostile State, which are found in the harbours or on the coasts of the Realm at the moment when war is declared, will be free to sail within a certain time, unless the Government, under special circumstances, does not think fit to prescribe any term for their departure.

For this purpose, the above-named ships will, on their departure, be provided with safe-conducts (passes) for their return to their own country, nevertheless, there may be an *embargo* or sequestration of such ships, by way of reprisals, when the enemy has, on the outbreak of hostilities, captured National merchant ships found in his ports, or has levied requisitions within the provinces of the Realm.

It has always been held that there is a right to lay an embargo on enemies' ships and goods at the outbreak of war, and this right has been exercised in Great Britain down to the outbreak of the Russian war, in 1854, when six

* The context of the following Articles shews that the word here used would be more aptly paraphrased by "Embargo" than translated by "Reprisals," which, in England, signifies a state of things antecedent to and not necessarily leading to war, by which the rights of subjects against a foreign State or individual may be enforced.

weeks were allowed to Russian ships in port, or which had sailed from a port before the outbreak of war to clear out, and they were further free from molestation on the voyage. Order in Council, of 29th March, 1854, France and Russia pursuing the same course.

244. Ships and goods laden on them which are so sequestrated, being enemy's property, may, according to circumstances, either be detained till the termination of hostilities or be declared good prize.

In the latter case, the proceeds will be used to indemnify *pro rata* in respect of their losses the subjects who have been injured by the enemy, the rules and procedure hereinbefore enacted being observed, both for the condemnation of the prize and the payment out of the proceeds.

It seems that this indemnification of injured subjects has been the object aimed at by an embargo or reprisals *prior* to hostilities. See Twiss, *War*, § 60, *ad fin.*, but an embargo at or after the declaration of war would enure like other prize to the Crown and its grantees.

245. The crews of merchant ships which are arrested, captured, or forfeited, will in all cases be set free; private persons of hostile nationality can only be detained by way of reprisal when the Power of which they are subjects has imprisoned the crews or seamen of National merchant vessels or of an allied Power.

The crews of merchant prizes are generally treated as prisoners of war (See *The Mary*, 5 C. Rob. 200, Perels, *Droit Mar. Int.*, p. 222, Ortolan, *Diplomatie de la Mer*, Vol. II., p. 35), and, this being so, the latter part of the Article would appear likely to control the liberality of the earlier part.

CHAPTER VII.

Of the Neutrality of the Country Towards Belligerent Powers.

246. In case of war between Powers with regard to which the State is neutral, their privateers or war-ships with prizes will not be received in the harbours, roadsteads, or coasts of the Realm, except in case of being driven in by distress.

They will leave as soon as the danger has ceased.

No ship of war or privateer of a belligerent may remain more than twenty-four hours in a harbour or roadstead, or off the coast of the Realm or adjoining it even when alone, except in case of being driven in by stress of weather, damage, or the want of supplies necessary for the safe prosecution of the voyage.

In no case will the sale, exchange, whether in money or kind, or gift of things captured, be permitted in the harbours, roadsteads, or shores of the Realm.

This and the succeeding Articles practically embody the practice of Neutral States in recent times, and especially during the Franco-German War. See Phillimore, *Int. Law*, Vol. III., § 168.

247. Ships of war of a friendly Power, even when it is a belligerent, may enter and remain in the ports, roadsteads, and off the shores of the State, provided that they are only employed in scientific pursuits.

This qualification of the preceding Articles is not likely to be of much practical value when *cedit armis toga*.

248. In no case can a belligerent vessel make use of an Italian port for warlike purposes or to obtain arms or munitions.

Nor can they under pretence of repairs undertake works of such a nature as to increase their capacity for war.

See Note to Art. 246.

249. Ships of war and privateers of a belligerent will not be supplied except with provisions and stores, and means for repairs actually necessary for the support of their crews and the safety of their voyage.

Ships of war and privateers of a belligerent which want to take in coal cannot receive supplies of it until 24 hours after their arrival.

The provision as to coal usual during the Franco-German war was that a ship of war should have "so much coal only as may be sufficient to carry "such vessel to the nearest port of her own country, or to some nearer "destination, and no coal shall again be supplied to any such ship of war in "the same or any other port, roadstead, or waters, subject to the territorial

"jurisdiction of Her Majesty without special permission, until after the "expiration of three months from the time when such coal may have been last "supplied to her within British waters, as aforesaid." Phillimore, *Int. Law*, Vol. III., § 168.

Which rule seems singularly short-sighted for Great Britain, as it makes her numerous coaling stations a source of weakness. Say two belligerent vessels, one of which is British, find themselves together in the River Plate, and short of coal, the British vessel can only take enough to take her to the Falkland Islands, her nearest port; the other vessel can fill up to go across the Atlantic, and meets the British vessel at an enormous advantage outside, as she has only to play a waiting game to win the battle.

250. When ships of war, privateers, or merchant vessels of two belligerents are found at the same time in a harbour, or roadstead, or off the shore of the Realm, an interval of at least 24 hours must be required between the departure of any ship of one belligerent and that of any ship of the other.

This interval may be increased, according to circumstances, by the Maritime Authority of the place.

See Note to Art. 246.

251. A capture, or any hostile operation between ships of belligerent States in the territorial waters, or in waters adjacent to islands belonging to the Realm, will constitute a violation of territory.

This is universally accepted now. Phillimore, *Int. Law*, Vol. III., § 161, *et seq.*

*** *Note.—Here ends that part of the Maritime Code Law of Italy which is of general interest; the remainder of the Mercantile Marine Code is composed mainly of disciplinary regulations for the Mercantile Marine.*

F. W. RAIKES.

V.—LAW AND CODIFICATION IN INDIA.*

INDIA is a short and apparently simple name for what is really one of the most complicated problems of Government with which British Statesmen and British Administrators have had to deal for many a long year. A problem quite as vast in its way, though not by any means so complicated, was before them about the time that the foundations of our present Empire in India were being laid, and that was the problem of retaining in some form of Union with the Mother Country the Thirteen Colonies which have made themselves into a Great Power, ruling from Atlantic to Pacific under the name of the United States of America.

The American problem, it must be confessed, our Statesmen and Ministries of the day did not even attempt to face, much less to solve. The Indian problem would perhaps have met with a very similar absence of attention, if it had come before us, like the American, in a fully matured condition. For the solutions, if solutions they be,—which is, we apprehend, a question not as yet fully answered,—offered by our elaborate creation of the Dominion of Canada and by our constitution of a Federal Council of the Australasian Colonies, were not as yet

* *The Story of Nuncomar and the Impeachment of Sir Elijah Impey.* By Sir JAMES STEPHEN, K.C.S.I. Macmillan. 2 Vols. 1885.

The Anglo-Indian Codes. Edited by WHITLEY STOKES, D.C.L. 2 Vols. Oxford. Clarendon Press. 1887-8.

Digest of the Indian Law Reports and Law Reports, Indian Appeals. By R. M. A. BRANSON, Barrister-at-Law. Bombay. Education Society's Press. Vol. III., 1884.

A Digest of Civil Law for the Punjab. By W. H. RATTIGAN, LL.D., Barrister-at-Law. Allahabad. Pioneer Press. Third Edition. 1888.

Four Letters on the Codification of Hindu Law. By F. V. *Bombay Gazette*, June 28—July 17, 1888.

dreamed of when Franklin and Washington and their fellow-workers were laying deep the foundations of the United States, and when Impey and Hastings and Francis and Barwell were meeting in Council, and often, it might seem, in a Council, so called only in grim irony, where almost every man's hand was against Hastings and almost every man's brain plotting against him.

The Story of Nuncomar,* so inimitably and graphically told long ago, after his own peculiar fashion, by Macaulay, has been told again for us no less inimitably and no less graphically, but, as we believe, far more truly, by Sir James Stephen, himself a successor of Macaulay and a continuator of Macaulay's own work in India, in the department of the simplification and Codification of the Law, in which it most deserved to be continued, and in which it must ever command our fullest sympathy. For Macaulay's graceful periods and eloquent misrepresentations of History, we can have no sympathy, and we cannot but be grateful to one so eminently fitted for it as Sir James Stephen for having undertaken the necessarily somewhat invidious and ungracious task of tracking his predecessor's inaccuracies and distorted or prejudiced statements. The work cannot have been pleasant, and we know that it must have been very hard, and in many instances—perhaps the majority—very weary, and, as it must have seemed, but thankless work after all.

It would have been a far easier, and, no doubt, a far more grateful task, to have confirmed Macaulay's account of the Legal struggle in which Nuncomar and Hastings stand out as the representatives, so to speak, of two opposing systems, the Native and the English conceptions of Law and of Justice. To hold the balance is in itself not by any means always an easy task, and therefore it is one which we so often find put on one side by professed writers

* *Nuncomar and Impey.* By Sir JAMES STEPHEN, K.C.S.I. Macmillan. 1885.

of History, who are content to take the easier line of being mere partisans. This it is, far more than the difficulty frequently experienced in getting at the real facts which, to a certain extent, has to many minds seemed to justify the Walpolian axiom that History "cannot be true." To track inaccuracy and misrepresentation through their countless slippery by-paths is, again, at no time an easy task, but the difficulty is enormously enhanced when so captivating and so popular a writer as Macaulay has to be displaced from his pedestal. Many are the misconceptions, too, as well as the misrepresentations, by which the real history alike of Nuncomar and of Hastings, has been obscured, and the true facts almost hopelessly distorted. Need we say that Nuncomar was not the Head of the Hindoo religion, as he has so falsely been called? Need we say that we are unaware of any person in India who then, or now, could be entitled to such a designation? Need we say that the conviction of Nuncomar was, on the facts proved, and under the then Law of England, not only a right conviction, but one from which there was practically no escape? Whether it would have been more politic to have exercised the prerogative of mercy, and so have spared the Brahmin caste the shock which the execution of so distinguished a member necessarily gave them, is a different question altogether. But, considering the infant condition of our power in India at that time, considering the utter indifference to such little matters as perjury and forgery which still unfortunately prevails among the natives of India, it is at least intelligible that Hastings should have deemed the execution a necessity of State. and it is at least intelligible that he may have been right, and that, virtually, no other course was open to him. That the trial under Impey, C.J., was an eminently fair one, Sir James Stephen has, by diligent reading through the record, fully satisfied himself, and we think his readers may

be equally satisfied on that head. That the trial itself was legally just and fair, we have no manner of doubt. That it was morally just or fair, we must confess, we do doubt. For Nuncomar the trial must have seemed almost an incredible thing. Perjury and forgery have long been so lightly esteemed in India that the Maharajah may well have doubted at first whether it could be seriously meant, or whether it could possibly be anything else than a cloak for a purely malicious prosecution to get an inconvenient person out of the way. This may, indeed, have been his feeling to the last, and it would be quite an intelligible one. That such was the real state of the case, however, we do not believe. All that we suppose Hastings to have aimed at is that he should, through Nuncomar, strike a blow which should deeply impress the Hindoo population with a sense of the power of England and of the long arm of English Law. That English Law should seem Justice to the Hindoos, Hastings could hardly have imagined, and he was probably supremely indifferent whether it did or not. For Warren Hastings strikes us as having in many respects been by nature a very Oriental ruler, in the sense in which Europeans sometimes shew themselves to be such. We do not suppose that he was for a moment troubled by any considerations of the moral aspect of the Nuncomar trial, when once he had determined that it must be held. Nuncomar himself was but a pawn on the board, and so were all who either served or obstructed his purpose. Doubtless that purpose was to put down all his own enemies and all the enemies of England, and so to be a great English ruler in India.

Doubtless, also, this aim of the policy of Warren Hastings may often have made his administration seem a relentlessly hard one, and for many it must have been so in fact. It was hard, very hard, unquestionably, for Maharajah Nuncomar to be, as it probably seemed to him, singled

out from such a mass of his fellow-countrymen and co-religionists, and put on his trial under laws of which he substantially knew nothing. It was hard, and it was also, we believe, impolitic, as well as morally unjustifiable, though there was no help for it when once the Law was set in motion. The Law was English Law, and the presiding Judge administered it with the fullest sense of the gravity of the position, if not of its hardship, and with the greatest impartiality. Impey does not appear to have shrunk from any labour, in order that the trial should be as full and as fair as possible, and in order that the accused might have every advantage to which he was entitled under English Law. The trial itself being once posited, the circumstances attending it, as far as the Court is concerned, are, we fully believe, creditable to the Court. Our objection is taken not to the mode of conducting the trial, but, *in limine*, to the fact of Nuncomar being placed in the position of incurring the penalties then enforced by English Law for an offence which he had not knowingly committed against that Law, and which was a Law not attaching to him by his domicile of origin or by his personal *status* as a Brahmin. Where the foundations of two systems of Law are so different as they are in the case of English and Hindu Law, it is clearly unfair to the Hindoo to apply to him the standards of the English Law, especially in a matter where ethical differences between the two systems are so broadly marked as in the subject-matter of Nuncomar's trial.

So far, therefore, we can sympathise with even the rascal, Nuncomar, though not entertaining the slightest doubt that he was, from our point of view, a great rascal. But if we can sympathise to this extent with the accused in this *cause célèbre* of English Law in India, we none the less sympathise also with the Judge who had to try the case, and with the Governor-General who had to confirm it, or, if he thought fit, to exercise the prerogative of mercy.

For both of these the position was in its way quite as trying, and we think that both felt it to be so, and certainly both deserve that the fullest consideration should be extended to their specially trying position.

Impey had to administer English Law and nothing but English Law, and by that Law Nuncomar, if convicted, had to forfeit his life, whatever the Judge might personally think as to the expediency of that Law, or its moral adaptation to the case.

Hastings had to uphold the as yet rather feeble British power in India, where it was not by any means certain that British influence would become dominant, or that the Company's *raj* would develop into the "Paramount Power," as it is now the fashion to call the Government of the Crown. Both men were, therefore, necessarily confronted with grave responsibilities of a far-reaching character, and each might well shrink from what lay before him.

The result of the trial has not been favourable either to Impey or to Hastings. Yet, the circumstances being such as we have briefly attempted to shew them, we do not believe that the result could well have been different.

We believe that, on the whole, both Impey and Hastings were passive rather than active instruments in forging the link of events, though there may have been a certain amount of selection in regard to Nuncomar, as one whose surroundings and *status* invested his acts with an importance which would make him a striking example. But the result must have been the same, whatever offender were selected for provoking the action of this strange Court, enforcing strange Laws in a strange country. Very different is the aspect which now meets us, for the most part, in the relations between English Law and the co-religionists of Maharajah Nuncomar.

Turn we to the *Anglo-Indian Codes*,* so ably drawn by such eminent successors of Macaulay as Sir James Stephen, the late Sir Henry Sumner Maine, and others, and so carefully edited by Dr. Whitley Stokes, who himself has been one of the later links in the chain of our Anglo-Indian Codifiers, and we shall find Laws the endeavour of whose framers has been to state tersely and clearly what acts or forbearances were intended to be the subjects of the respective Codes, and, as far as possible, on neutral ground, to be applicable to all our Indian fellow-subjects without touching on the personal Law under which they may live. Some of these Codes, indeed, are so applicable to European and specially to British needs, that they have been edited separately by English Jurists, with a view to commending them to our legislators and to members of the Legal Profession at home, *e.g.*, the *Negotiable Instruments Act*, 1881 (Calcutta and Lond., Thacker. 1882), edited by Mr. M. D. Chalmers, now Judge of County Courts. It had long been known among us, therefore, with what care these Anglo-Indian Codes were framed, and how the art of Codifying had, as it were, made itself a home among English Jurists in India almost alone among the members of the English Bar. At home, there had, no doubt, from time to time arisen men who, like Bentham, Romilly, Brougham, Macaulay, lifted up their voices in favour of Codification, but their united voice was but as "*Vox clamantis in deserto,*" and scarce one was found who heeded the voice.

One great value of the Anglo-Indian Codes unquestionably consists in their shewing, as far as they go, imperfect as they still are, that Codification is not the impossibility which the advocates of the chaotic system actually obtaining in England are apt to represent it. What has

* *The Anglo-Indian Codes.* Edited by WHITLEY STOKES, D.C.L. 2 Vols. Oxford. Clarendon Press. 1887-8.

been done and is still being done for our European and Native fellow-subjects alike, in India, could be done here, if the will to do it were present. In the absence of that will we remain hide-bound, case-bound, Report-bound.

We have said that the Anglo-Indian Codes do not trench on the Personal Law of our Indian fellow-subjects. This seems to be so clear a corollary from the Royal Proclamation published when the Crown assumed the direct rule of what is now formally styled the Indian Empire, that it would have been unnecessary to emphasise the statement but for certain expressions which occasionally fall from Dr. Whitley Stokes, as where he speaks, in a note of a given provision in a particular Indian Act, as appearing to "repeal" the Mohammedan Law on the point in question. (*Anglo-Ind. Codes, I.*, p. 496, *n.* 1, under the Indian Contract Act, the point raised being the sale of pork or wine, void in Mohammedan Law, Hedaya, II., 429).

We feel bound to submit that whether the Indian Legislator intended to do this, or not, the alleged or presumed "repeal" would equally be *ultra vires*.

We did not enact the Mohammedan Law, and we cannot repeal it. Nor, if we could, would the repeal be in conformity with the Royal Proclamation above referred to. Moreover, as the Mohammedan Law flows from the Koran, and derives its force from the Koran, we could not repeal any part of the Mohammedan Law without *pro tanto* repealing, or purporting to repeal, the portion of the Koran in which the repealed Law was contained. But, *ex professo*, the Law of the Koran must be maintained by us, for those of our fellow-subjects who follow that Law, as their personal Law, under the protection of the Paramount Power, and in terms of the Royal Proclamation assuming the direct government of India.

It may be that we have not rightly apprehended the meaning, on this point, of the learned Editor of the *Anglo-Indian*

Codes. But, if so, we submit, he must have used language somewhat after the fashion commended in the epigram attributed to Talleyrand, as a means of concealing, rather than of expressing, his thought.

On another point, that of the "Illustrations," which confessedly form one of the salient features of the Anglo-Indian Codes, we are not by any means so enthusiastic as the learned Editor. Illustrations may be, and conceivably are, in certain cases, very useful. But they are not an invention of the nineteenth century, in any sense that we can understand, for they were practically known to the Roman Jurists; nor does it appear to us that they ought to rank as decided cases of the highest class, because decided by the highest authority, viz., the Legislature, as the Indian Codifiers contended.

There are points in the framing of the Indian Codes which might evidently lead to difficulties, apparently not apprehended by the Codifiers. Thus, the initial statement that the Penal Code is to apply to "every person" in British India after the Act containing it should come into force, is clearly far too sweeping in its application; Dr. Stokes, indeed, suggests that our Courts in India would probably hold Ambassadors and their suites exempt by the Law of Nations, but in the presence of an express direction of the Code, it may be doubtful whether Judges of English training would decide in favour of an exception which might seem to be expressly excluded by the sweeping language of a document out of whose four corners they might hesitate to travel. A case in point might easily arise on the occasion of some Embassy from Caubul, Lhassa, Pekin, or other capitals with which a British Viceroy of India has to maintain guarded relations combining courtesy with watchfulness. The result of the application of the Indian Penal Code in such a case might seriously embroil Great Britain with neighbours whose suspicions once aroused would be hard to appease.

Besides Codification proper, however, there is another no less important work which has for some years past been carried on in India by the zeal and energy of private individuals, and that is the drawing up of *Digests* either of the Reported Cases in the several Indian Presidency Courts and in the Privy Council on Appeal, as in the case of Mr. R. M. A. Branson, of the Bombay Bar (Bombay. *Education Society's Press*, Vols. I., II., III., last pub., 1884) ; or the still more difficult case presented by the *Digest of Civil Law for the Punjab*, drawn up from the existing Hindu and Mohammedan Customary Law of the Land of the Five Rivers by our valued contributor, Dr. W. H. Rattigan, the third edition of which (Allahabad. *Pioneer Press*, 1888) is now before us.

Each of these is in its own sphere an indispensable guide for the Indian Practitioner or Judge and Magistrate, no less than the *Anglo-Indian Codes* of Dr. Whitley Stokes. We have spoken of both before in the terms of commendation which they so honestly deserve, and we shall have occasion to refer to them yet again, as often as we may have space at our disposal for the consideration of that most interesting branch of the field of Jurisprudence which is concerned with Indian Law. For the term Indian Law is like the term India, the apparently simple name of a vast and complicated problem.

The variety of the Laws and Customs covered by the expression must be patent to anyone on a very brief perusal of the contents of either of the *Digests* just named. Thus, in Mr. Branson's latest volume (Vol. III.) to hand, we find more than nine columns devoted to such a side branch as Malabar Law, and we read decisions on bequests for maintenance of a Temple or of Idols, and on Mutta marriage among Mahommedans, &c. We also come across such expressions from the Bench as the following, tending to shew that "justice, equity and good conscience"

are not always, even in the Bombay Presidency, construed to mean English Law (Whitley Stokes, *Anglo-Ind. Codes*, I., Int., p. xiv., citing 6 Bom. H.C., 36, 52). In a *Waqf* (or *Vakouf*) case, before the Bombay High Court, involving the English doctrine of perpetuities, the Court said, *per* West, J., "The rule against perpetuities extends to a colony in which English Law is enforced only so far as it is adapted to the circumstances of the community. . . . . The Courts have to pronounce whether any particular object of a bounty falls within the definition, but they must in general apply the standard of customary law and common opinion amongst the community to which the parties interested belong. Objects which the English Law would possibly regard as superstitious uses, are allowable and commendable according to the Hindu law, and not less so according to the Mahommedan law. Granting there is a charity, the objection to a perpetuity fails according to the principles of the English Law" (*Fatmabibi* v. *Advocate General of Bombay*, I.L.R., 6 Bom. 42, 1881). Of course this reasoning does not apply, as was carefully shewn in the same judgment, "where the proposed object of the endowment is one directly contrary to the law of the State." That seems obvious, though, as to the judgment generally, we are not sure that it might not be considered by some to exhibit an ingenious sailing round the four corners of the English Law as to Perpetuities rather than a keeping within them.

In Dr. Rattigan's pages, which are designed to embody a Digest of the Customary Law of the Punjab, as far as Judicially ascertained, we likewise meet with a considerable variety of Laws and Customs, with many, of which the learned author of the *Digest* has already made readers of the *Law Magazine and Review* familiar, in his interesting article on *Crime and Social Life on the North-West Frontier of India*, No. CCLVI., for May, 1885, and in his still unfinished

series on the *Land Laws of India*, of which the second, in No. CCLIX., for February, 1886, was devoted to Bengal Tenures, while the third dealt with the Land Settlement and Tenures of the North-West Provinces, in No. CCLXI., for August, 1886. To the readers of those Articles *zemindari*, *pattidari*, and *bhaiachara* tenure will not be mere empty words, but will respectively connote that the village lands are common property, or divided into two or more portions called *pattis*, held in severalty, or that the proprietor's rights are limited by the extent of his property, but the whole is liable for default in the case of a single owner, as in the last two tenures.

Dr. Rattigan's valuable *Digest* is, of course, a totally different one from Mr. Branson's. Each serves a distinct purpose of its own. But the great value of the work undertaken by our own learned contributor consists in the fact, which he has by its successful accomplishment practically demonstrated, that there is no insuperable bar to Codification even in districts such as the Punjab, where villages are inhabited by extremely mixed populations, and where Hindu and Mohammedan, Sikh and Pathan are frequently inhabitants of the same locality, and with rights and interests inextricably mixed up in the same lands. To shew this was part, at least, of the author's aim. That he has succeeded in doing this, within the limits of his still moderate, though sensibly enlarged volume, no one who has studied its contents, having any previous acquaintance with Hindu and Mohammedan Law, would for a moment deny.

That this was both in itself and in the wide *vista* of possible results which it opens, well worth the shewing, a very slight glance at the special difficulties which necessarily attach to Codification in India, and which must lurk in waiting for the Indian Codifier at every corner of his work, ought to make sufficiently clear. In Dr. Rattigan's

Digest will be found accounts of the customs of many of the wild clans who make social life on the North-Western Frontier at once so picturesque and so unsafe. The Settlement Reports of Kangra, Hazara, and other districts, are laid under contribution no less than the various Punjab and N.W.P. Acts and Regulations, to shew what is recognised as the Customary Law of those districts and of the tribes inhabiting them. We could have wished that the plan of the book admitted of citation to a greater extent than that of the strict proposition extracted, for we believe that these Settlement Reports, written by some of our ablest Civil Servants, afford most interesting reading, independently of the valuable information they contain. Still the facts as set forth are in themselves curious as giving a microcosm of Life in the North-West.

The fact that Dr. Rattigan's second edition, issued in 1880, was out of print, coupled with the passing of the Punjab Tenancy Act, 1887, called imperatively for a new edition of a volume which is of value alike to the scientific Jurist in this country, and to the Judge and Magistrate or Collector, in Punjab and the North-West Provinces. The learned author has waxed in dignity since the publication of his second edition and it says much for his untiring devotion to that subject of which he is admittedly such a considerable master, that both his interesting volume on *Jurisprudence*, of which we spoke at some length in our number for August, 1888, and this third edition of the *Digest* should have been brought out since his accession to the Bench of the Chief Court, and the Vice-Chancellorship of the University of the Punjab.

From Bombay we have received a valuable collection of Articles on a subject of considerable interest, the Codification of Hindu Law, contributed to the *Bombay Gazette*, in the course of last year, by a Member of the Bombay Bar, who signs his communications with the

initials F. V., which we believe to stand for the name of a well-known Hindu Member of the Bar practising in the High Court at Bombay.

The subject treated in these Articles is a very weighty one, the more so that any approach to a scientific study of it is itself quite modern, whether among native or English Jurists. That Hindu Law should be studied scientifically is a primary necessity, before any attempt at Codification, and this necessity has been earnestly advocated by English members of the Civil Service, such as Mr. J. H. Nelson, M.A., in his able *Prospectus of the Scientific Study of the Hindu Law* (London and Madras. 1881). The reasons urged by F. V. deserve careful consideration as coming from one whose interest in the matter is practical, inasmuch as the Law which he proposes to have codified is the Personal Law under which he himself lives. This gives his advocacy a special force, and although we may not always be able to agree with his reasoning, we hope a fair hearing will be given him by all who take an interest in India.

The questions raised in the several works briefly noticed in the present Article are too serious to be discussed in the compass of one Paper, and we shall therefore hope to return to them in subsequent issues, as our sense of the importance of India and of Indian Law has for some years past led to our giving space to those subjects, such as we felt their importance demanded. As we have been fortunate in the Past in our fellow-workers in bringing these subjects before our readers, so we shall hope to be in the Future. In any case, we commend to the serious consideration of our readers the several works and writings to which we have, however imperfectly, drawn their attention, and we do so commend them on the broad ground of the light which they will severally be found to throw on Law and Codification in India.

VI.—NOTES OF THE QUARTER ON INTERNATIONAL LAW.

The Sackville Incident.

THE "Further Correspondence respecting the Demand of the U.S. Government for the Recall of Lord Sackville,"* issued in March last, in the form of a State Paper, affords a clearer insight into the American part of that transaction than was previously to be obtained in this country.

The document opens with a letter from Mr. Herbert, our temporary *Chargé d'Affaires* at Washington, to Lord Salisbury, stating that the real name of the notorious "Murchison" was George Osgoodby, a fruit grower of Pomona, California, and enclosing an extract from the *New York Times* of Jan. 9th, 1889.

The latter contains a transcript of a remarkable epistle to General Harrison, "President Elect," signed by two persons, one of them purporting to be a Judge. Briefly, this effusion consists of (1.) A repudiation of office-seeking motives; and (2.) A testimony to the virtues of George Osgoodby, and the whole certainly constitutes a unique document. Its authors confidently assure General Harrison that Mr. Osgoodby "is a modest man of intelli-"gence and thought, and has been a teacher," and further that they "know him, and have confidence in his manhood, "probity, honour, and patriotism."

The gist of the whole letter is contained in the following extract, which speaks for itself: "The author himself, after "doing an act transcendent in its political effects and one "that has justly made him famous, naturally objects to being "robbed of whatever credit may be fairly due to him for

* *Parliamentary Paper, U.S.*, No. 1 (1889), C. 5,626.

"his remarkable achievement. We have deemed it right "as well as a duty to acquaint you with the indisputable "facts, and we ask only that you consider them upon their "merits."

This "naïve confession of unconscious baseness"* by the friends of the first cause of all the trouble, is somewhat appropriately followed in the State Paper by what purports to be a defence by Mr. Secretary Bayard, of his conduct in the Diplomatic part of the transaction.

In spite of its voluminous nature, this latter document is really as complete a confession of weakness as could well issue from the pen of an *ex parte* advocate.

Nearly half of it is occupied with a statement of the facts from the point of view of the American Government, and as such, merely creates a joinder of issue with our own Foreign Office on the question of fact. The point of real interest centres in the latter part of the communication dealing with the legal aspect of the question. Mr. Bayard cites the case of Sir Henry Bulwer, in 1848, already referred to by Lord Salisbury,† and then, by a process of critical examination into the facts of that case, distinguishes it altogether from the Sackville incident. He points out that "in the former the objection of Spain was to the "action of Lord Palmerston and presumptively of the "British Ministry of which Sir Henry Bulwer was but "the channel of communication;" in short, that "the "case was in reality a suspension of diplomatic inter-"course."

Undoubtedly, if this be true, the case differs materially from that of Lord Sackville, but the effect of Mr. Bayard's reasoning is then simply to cut away from under his own feet one of the few precedents which in any way tend to support his conduct towards the British Minister.

* *New York Times*, 10th Jan., 1889.

† See *Law Magazine and Review*, No. CCLXXI., for February, 1889, p. 118.

The citation from Calvo* also hardly bears out Mr. Bayard's contention. The essential point therein stated is the very one in Lord Salisbury's argument which Mr. Bayard ignores or misapprehends, *i.e.*, that it is only when "the "offence committed is of a *grave* character" that the Minister may be dismissed without waiting for the recall by his own Government.

Lord Sackville's alleged offence could not possibly be deemed to come within this description, differing as it does *in toto* from the recorded cases on which Calvo's proposition is based.

There is no doubt, moreover, as Lord Salisbury clearly stated, that even as regards the *demand for recall*, it is the established duty of the offended State towards the Government to which the demand is made to "satisfy it by reasons "duly produced of the justice of the grounds on which the "demand is made."

In this, as in the rest of the regrettable incident, the U.S. Government exhibited "a striking departure from "the circumspect and deliberate procedure by which "in such cases it is the usage of friendly States to mark "their consideration for each other." †

* *

Discovery in Aid of Proceedings in Foreign Court.

The question whether an English Court of Equity will grant Discovery in aid of proceedings in a foreign Court was decided by Mr. Justice Kay in the negative, in the case of *Dreyfus Bros. & Co.* v. *The Peruvian Guano Co., Limited.*‡

* *Parl. Paper, U.S.*, p. 9; and see Calvo, *Dr. Int.*, 4th ed., 1888, Vol. III., p. 213.

† *Parl. Paper*, 5,616: Lord Salisbury, p 14.

‡ *W. N.*, 1889, p. 52, and *Times Law Reports*, Vol. V., p. 323.

The plaintiff company had obtained judgment against the defendant company in the Belgian Courts, on a matter arising out of the well-known Peruvian Guano contracts, but, being unable to ascertain the precise nature of the sum claimed except from the defendants, they had made this application to the English Court for full Discovery of the accounts, books, and papers of the defendants relating thereto.

The only case cited in support of the contention of the plaintiffs was an old one, *Crowe* v. *Del Rio*, decided in 1769, and not reported, but mentioned only, without comment, in Lord Redesdale's work on *Pleading*, p. 186. On the other hand, *Bent* v. *Young*, 9 Sim. 180, and other subsequent cases, threw considerable doubt on the validity of that decision.

Kay, J., deemed that, in view of this fact, it would be inexpedient to permit Discovery under such circumstances without the authority of an Act of Parliament.

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Conflict of Laws: Statute of Limitations (*Pardo* v. *Bingham*).

In *In re Bowes, Strathmore* v. *Vane*, W.N., 1889, p. 53, the well established principle in *Pardo* v. *Bingham*, L.R. 4 Ch. 735, was considered in the light of somewhat complicated circumstances. The creditor of a deceased Englishman claimed to prove under an administration in respect of two sums of £2,400 and £10,000. The latter claim was admitted, but the former disallowed on the ground that it was barred in England by the Statute of Limitations, though not barred by French Law. The creditor had obtained security by means of an attachment in France upon the assets of the testator.

Mr. Justice North held that he was entitled to prove in respect of the £10,000 without bringing into hotch pot the proceeds of the Security in France as regarded the £2,400.

Property Savouring of Realty an Exception to *mobilia sequuntur personam.*

The rule that "property savouring of the realty" is excluded from the operation of the maxim, *mobilia sequuntur personam*, has been on several occasions very distinctly enunciated.

Freke v. *Carberry*, L.R. 16 Eq. 461, decided that the Thellusson Act applies to a disposition of English leaseholds by a person domiciled abroad, and in the somewhat later case of *Re Gentili*, Irish L.R., 9 Equity 541, the principle was extended generally to all questions of succession to chattels real.

In the very recent case of *In re Duncan and Lawson*, W.N., 1889, p. 78, the facts were very similar to those in Gentili's case. A domiciled Scotchman by his will devised all his property, including leaseholds in England, to trustees in trust for certain persons, with an ultimate remainder, as to the residue, on failure of his issue, to certain specified charities. The issue having failed, and the charitable bequests being void under the Mortmain Act, the question was raised whether the next-of-kin of the testator, according to English or Scotch Law, were entitled to the undisposed of leaseholds in England.

In accordance with the above-mentioned decision, North, J., held that the devolution of the leaseholds must be determined by the *lex loci rei sitæ*, and that they therefore devolved on the next-of-kin according to the English Statute of Distributions.

* * *

Naturalisation: Guardianship of Infants Born Abroad.

Some interesting points as to Naturalisation and the appointment of guardians by an English Court to children born in a foreign country arose, but were not decided, in *In re Bourgoise, Infants*, W.N., 1889, p. 64. The Court of

Appeal refused, on grounds of expediency, to interfere with an appointment made in the French Court.

The case is noteworthy for purposes of comparison with that of *In re Willoughby, Infant*, 30 Ch.D., 325, in which the Court of Appeal upheld the appointment of a guardian by an English Court to a child born in France, the sole claim to the jurisdiction exercised being the fact that the infant's paternal grandfather was a natural born British subject, and that the infant was therefore itself a British subject in the eyes of our Law.

Quarterly Notes.

The Centenary of 1789, and the Congresses to be Held in Paris.

That the French nation should resolve to celebrate the hundredth anniversary of the Convocation of the Constituent Assembly of France, which dealt the death-blow to the *Ancien Régime* under the nominal headship of the last ruler of France under that *Régime*, is not at all remarkable. That extremely divergent views are held by many, even in France itself, concerning the extent and the value of the so-called Principles of 1789, is likewise not at all remarkable. But that the celebration of so distinctively Political an event as the States General of 1789 should be marked by an International Exhibition, and, in connection therewith, by International Congresses on matters of Juridical, Scientific, Commercial and Industrial interest, is a really remarkable fact, and one which ought, we think, to be recognised as shewing that France really desires, as she certainly needs, Peace at home and abroad.

We have tidings of Congresses on Criminal Anthropology, and of an Exhibition of Retrospective Art and Anthropo-

logical products, the one intended to discuss the difficult but interesting and important problems which perplex alike the Penal Jurist and the student of Social Science, and the other to set before us a kaleidoscopic vision of man's handiwork from his carving of the outline of the mammoth and reindeer on bone implements found in the Caves in the Dordogne, to the electric light with which the Tour Eiffel is to illuminate alike itself and the Exhibition. We hear also of Congresses on Maritime Law, Company Law, Real Property Law, Education, Geography, and other subjects of practical interest. Besides this array, formidable enough in the way of solid food for the mind of the visitor to Paris during the Centenary Festivities, there is to be a celebration by the Society of Comparative Legislation of the twentieth anniversary of its foundation, in commemoration of which two special Sessions are to be held on 29th and 30th July, followed by a Banquet on 31st July. The subjects chosen by the Council of the Society are (1) the Powers of Upper Chambers or Senates in the matter of Money Bills ; (2) *Patria potestas*, its prerogatives and limits. This action of the Society bears no reference to the Centenary, it will be observed, but is purely commemorative of the Society's own history, though the dates fixed happen to fall within the period of the National Festival. The Congress on Higher Instruction and Secondary Education (to be held at the Sorbonne, 5th to 12th August) is organised by the University of France, and has for its Honorary Presidents the well-known Senator Jules Simon and M. Berthelot, and for its President M. Gréard, Vice-Rector of the Academy of Paris, all three being members of the Institute. The Congress on Company Law, to be held at the School of Political Science, 27, Rue St. Guillaume (after the opening Session at the Trocadéro), 12th to 20th August, is organised by Decree of the Minister of Commerce, and has for its President, M. Larombière, of

the Institute, President of the Court of Cassation, a past President of the Society of Comparative Legislation, and for its Vice-Presidents, M. Louis Renault, Professor in the Faculty of Law, Paris, a distinguished leader of Thought among French Jurists, and M. Rodolphe Rousseau, Advocate of the Court of Appeal. The programme issued for this Congress embraces a wide field, covering the constitution of Companies; their management, and the best mode of regulating the difficult points in International Law to which the ever-increasing relations of the Commercial world daily give rise in matters relating to Companies. On many of these important questions the deliberations of an International Congress of Jurists and business men cannot fail to throw light which may be of great value in paving the way alike for Municipal legislation and International Conventions, and we think the subject an eminently practical one for consideration at the present time. We are glad to note among the earliest adherents of the Congress on Company Law, our valued colleague, M. Clunet, and one whose name recalls to us the International Congress of Commerce and Industry at Brussels, 1880, M. Demeur, Advocate in Brussels, as well as M. Goirand, now a Deputy in the French Chambers, whose translation of the French *Code of Commerce* was brought to the notice of the readers of this *Review*, besides other leading members of the Legal Profession in France and Belgium.

The Congress for the study of the question of the Transmission of Real Property is also organised by Decree of the Minister of Commerce and Industry, and has for its President M. Duverger, Honorary Professor in the Faculty of Law, Paris, and for Vice-Presidents, the well-known Deputy of the Seine, Yves Guyot, since named Minister of Public Works; M. Duplan, President of the Chamber of Notaries; and M. Gonse, Councillor of the Court of Cassation, a past

General Secretary of the Society of Comparative Legislation. The Committee contains the names of Professors in the Faculty of Law, Senators, Deputies, Advocates, &c., among whom may be more particularly mentioned M. Bétolaud, Advocate of the Court of Appeal, Paris: M. Bufnoir, Professor in the Faculty of Law, Paris; M. Gide, Professor in the same Faculty at Montpellier; the Governor and General Secretary of the Crédit Foncier, and others, all of mark in their several lines. It is proposed to discuss some of the principal questions of interest in International as well as Municipal Law bearing upon the transmission of Real Property, such as the Torrens System, the German System, the Homestead System, &c., as well as those of a specially Economic character tending to facilitate the change of ownership in land, and the possibility of effecting a transformation of existing systems both in France and in other countries.

The field covered by the Real Property Congress, it will be seen, is to the full as important and as wide in the interests affected as that of the Congress on Company Law. Both have good men at the head of affairs, and both have our best wishes for good and full discussions, leading up to improvements alike in Municipal and in International Law.

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The Outlook in Home and Foreign Politics.

Our valued contributor, Mr. Alexander Robertson, M.A., has just issued a new and enlarged edition of his *Political Addresses on Home, Irish, and Colonial Affairs, and on Indian, Egyptian, and Foreign Affairs* (Dundee: Winter, Duncan & Co. 1889) which were delivered at Broughty Ferry and Dundee in the course of last year. The revision has been in most cases brought down to date, but, curiously enough, while introducing a criticism of General Boulanger's attitude,

which is a recent factor in French Politics, the Emperor Frederick is still reckoned among the living, instead of among the majority. With Mr. Robertson's general position our readers may be assumed to be fairly well acquainted through our previous notices of works from his pen, as well as from his own Articles in this *Review*. It is, perhaps, not very easy to ticket Mr. Robertson, and we do not know that he particularly cares to be ticketed, his views being of an independent rather than a party character. He believes in the necessity for an early settlement of the Irish question, but he pleads earnestly for equal treatment to be meted out to Scotland, Wales, Ireland, and England. Let all be placed on an equal footing of Local Self-Government, is his cry, and let not one have it at the expense of the others, or instead of, or in preference to the others. For such a preference he sees no reason. The Parnell Commission he seems to view somewhat as we ourselves did. He would have had a Parliamentary Commission, or the ordinary Law Courts. What has been the talk of the Town can only be defended as a private enquiry, though we held such an enquiry to be a very bad precedent. In Australasia Mr. Robertson sees a growing Empire, which the Australasian Colonies and ourselves may now both be said to realise, the first step having been taken in 1884, in the manifesto of the Sydney Convention. It is now, Mr. Robertson says, an axiomatic truth both in the Old World and the New. Our present Dual Government of India he regards as expensive and tending to bad management, the Council for India having no effective power of control over the Secretary of State for India, although, we may remark, that functionary professes to act "in Council." Our position in Egypt he briefly defines thus (p. 219): "We should re-organise and evacuate." Progress in re-organisation has been made, he admits, but "not enough to justify us in withdrawing our support from the edifice

which we have raised on the ruins of the old, corrupt, and dangerously inflammable material in the Egyptian Government." The only doubt we entertain ourselves as to this opinion is whether Great Britain can really be said to have raised any edifice at all in Egypt as yet. In the Balkan Peninsula, as it is called by Politicians, in defiance of text-books on Geography, Mr. Robertson sees that the real Problem is the supremacy of Western Civilisation over that of the East. He says, as we have long seen and known, that Austria wants to reach the Ægean at Salonica, and means to get there, and that Italy has a stake in the solution of the Balkan Problem. He sees, as he thinks, and we believe rightly, that Roumania must throw in her lot with the Balkan States, and that thus both banks of the Danube will be on the Western side in the solution of that greater Problem, known as the Eastern Question, of which the Balkan Problem is only a portion. General Boulanger being at present the guest of Great Britain, though a self-invited one, we abstain from questioning whether he aspires to be a Monk or a Cromwell. The latter is Mr. Robertson's choice for the "brave Général."

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The Comité de Législation Etrangère, Paris.

We have just received from the Ministry of Justice of the French Republic the information, which cannot but be of interest to Jurists visiting Paris during the Centenary Festivities, that, by a special exception to the ordinary practice, the Library of the Comité de Législation Etrangère, at the Ministry, will be kept open daily, except Saturday and Sunday, during the afternoon, from two to four, throughout the vacation of the Paris Law Courts, 15th August to 15th October. As this special favour is expressly conceded with a view to enabling Jurists and Statesmen of all countries, who may be in Paris during the

period named, to study this useful and instructive *annexe* to the Ministry, we hope that they will take advantage of the concession, and on their return home see if they cannot help to make the Library even more complete than it appears to be. The Government of India, and the Governments of most of our Colonies, have responded to the appeal of the Committee, made through the Ministry of Justice. We hope that New South Wales, which, alone of the Australian Colonies, appears to be wanting, will soon supply the *lacuna* for which it is responsible. The Committee, whose President, M. Léon Aucoc, we ourselves have had the pleasure of meeting while he filled the Presidential Chair of the Society of Comparative Legislation, numbers among it members M. Georges Louis, whose able Essay on *Les Droits et Devoirs des Particuliers en Temps de Neutralité* we noticed in this *Review*. It has a staff of "Auxiliaires," Specialists, ready to give information on their special subjects, among whom we note with pleasure our colleague M. Clunet, and our valued contributor, Dr. Thomas Barclay. It has also undertaken the publication of translations of Foreign Codes, several of which we have already noticed, while some, but lately received, are in the hands of contributors who will know how to do justice to the work of this most valuable institution, the Comité de Législation Etrangère.

Reviews.

History and Law of the Foreshore and Sea Coast, with Hall's Essay on the Rights of the Crown. 3rd Edition. By STUART A. MOORE, F.S.A., of the Inner Temple, Barrister-at-Law. Stevens and Haynes. 1888.

The first edition of Hall's Treatise on the *Seashore* was published in 1830. This was followed by the second edition, improved by Mr. R. Loveland-Loveland in 1875. The third

edition of this valuable work is now before us. The present Editor has been led into re-writing the history of the Foreshore, owing to his desire of controverting some of the arguments of Hall, which he deems to be too much in favour of the Crown. Hence we have a large accretion of upwards of six hundred pages as the preface to the original work. But the accretion does not contain entirely new matter. The whole of Hale's Treatise *De Jure Maris* is bodily inserted, besides another Treatise, *De Portubus Maris*, evidently the original draft of the *De Jure Maris*, and "Concerning the Customs" is also appended. The reader may learn much from this new edition. Nearly double the size of the former editions, it contains twice as much information. The Editor has diligently traced the history of the Foreshore from the Saxon period to the present day, and the learning to be gleaned is interesting and useful. Here the archæologist and the lawyer meet on common ground. The history of the grants of wrecks of the sea to subjects by the Crown is very comprehensive, and worthy of careful study. Indeed there is scarcely a page of this valuable work that does not teem with varied and erudite information. It is to be regretted, however, that the present Editor does not appear to have consulted Sir Sherston Baker's monograph on the *Office of Vice-Admiral of the Coast*, as many passages now obscure to the ordinary reader would have been made clear through the side-lights thrown by that work, and the book before us would have been proportionately the more valuable. We hope that Mr. Stuart-Moore may see his way to this improvement in a future edition, and meanwhile we wish all success to his learned and laborious compilation.

Bullen and Leake's Precedents of Pleadings, with Notes and Rules Relating to Pleading. Fourth Edition. Revised and adapted to the present practice in the Queen's Bench Division of the High Court of Justice. By THOMAS J. BULLEN, Esq., and CHARLES WALTER CLIFFORD, Esq., both of the Inner Temple, Barristers-at-Law. In two parts. Part. II. Stevens and Sons. 1888.

We greet the Second Part or Volume of these accurate and popular Precedents with great satisfaction. The high standard of the work is well kept up. This volume purports to deal only with Defences and subsequent Pleadings; but it really

does more. It will be serviceable as regards Statements of Claim. The first chapter contains a review of Pleading in general, drawn from the Rules of the Supreme Court, 1883, embracing the whole range of Pleadings. The subsequent chapters are devoted to the Precedents themselves, but the voluminous and copious notes render the present Part a complete exposition of the Law on the subject of which it treats. After a short dissertation on the Law as bearing on each Precedent, there are numerous quotations of leading and recent cases—brought, apparently, almost down to the day of issue. We may give the following as an illustration of the style of the work. The note to the defence of "Accord and Satisfaction," on page 87, first explains what is meant by "Accord and Satisfaction." It then states that payment of a smaller sum is no satisfaction for a larger; and gives the apparently conflicting decisions on the subject, commencing with the famous old *Pinnel's Case*, including the leading case of *Cumber* v. *Wane*, and the recent ones, *Sibree* v. *Tripp*, *Goddard* v. *O'Brien*, *Foakes* v. *Beer*, and *Bidder* v. *Bridges*, explaining the reason of the seeming exception to the rule in *Sibree* v. *Tripp* and *Bidder* v. *Bridges*. The note to Accord and Satisfaction altogether covers four pages, and completely exhausts the law upon the subject. Turning again, at random, to the Defence of Statutes of Limitation, in a note of over 10 pages the Statutes themselves, and the law of cases in connection with them, are all fully set out. The work gives evidence of great pains all through, and likewise of marvellous accuracy. To avoid repetition, occasional references are made to Part I. This part appeared in 1882, since when the Judicature Rules of 1883 have appeared, and have made certain changes in Pleadings. These changes, however, when occurring, are pointed out. Part I. was edited by Mr. T. J. Bullen and Mr. Cyril Dodd. The present Editors, in their Preface, regret the absence of the co-operation of Mr. Cyril Dodd, but thank him for the assistance he has rendered at various stages of the work.

The Complete Annual Digest of Every Reported Case in all the Courts, for the Year 1887. Edited by ALFRED EMDEN, of the Inner Temple, Barrister-at-Law. Compiled by HERBERT THOMPSON, M.A., LL.M., of the Inner Temple, Barrister-at-Law.

The Same, for the Year 1888. Edited by Alfred Emden, Esq. Compiled by Herbert Thompson, Esq., assisted by Robert T. Gill, of Lincoln's Inn, Barrister-at-Law. William Clowes and Sons, Lim.

It is unnecessary to give more than a brief notice of these two issues of a well-known Annual Digest. They are continued precisely on the lines of those of former years, presenting to the practitioner, as is their object, a series of inexpensive works, comprising Annual Digests of every reported case in all the Reports, and so arranged as to prevent the possibility of any escaping notice. Indeed the chief feature of the book is its admirable arrangement. This comprises, 1st, a list of abbreviations, the only part of Emden's *Digest* which may seem to be a work of supererogation, as the practitioner, for whom the work is intended, will, unless indeed an utter novice, be already acquainted with them. But as the List only occupies one page, the point is not very material. The complete Index to all the English cases for the year, which comes next, is eminently useful, containing, as it does, references to all the Reports and to the column of the Digest where the facts are laid down. After this comes a Table of Cases followed, overruled or specially considered, with reference to the column in the Digest where the case may be found which affects each, and from this, the practitioner can, by reference to the Reports themselves, connect and distinguish one decision with or from another, and ascertain, when Judges have not exactly followed or overruled precedents, what influence those precedents have had upon their minds. The Table of Statutes which follows is a list of those Statutes which the cases of the year concern, the particular case, with reference, being noted after the section of the Statute with which it deals. The next Table, that of the Rules of Court, is treated similarly, the only Rules tabulated being those which affect cases of the year. The next and last Table is that of those cases in the Annual Digests of the last three years which have been decided on Appeal. Therefore, at a glance, the practitioner can ascertain whether during the year there has been any decision affecting any Statute, Rule of Court, or previous case. The body of the work to the end contains the cases themselves, *i.e.*, all those which have been decided by the House of Lords, the Privy Council, the Court of Appeal, the several Divisions of the High Court,

the Court of Bankruptcy, the Court for Crown Cases Reserved, the Election Petition Judges, and a selection from Irish and Scotch decisions, together with references to American Reports of standing. We find thus embraced every case which is contained in the *Law Reports*, *Law Journal Reports*, *Law Times Reports*, *Weekly Reporter*, *Cox's Criminal Cases*, *Aspinall's Maritime Law Cases*, *O'Malley & Hardcastle's Election Petition Reports*, *Fox's Registration Cases*, *The Justice of the Peace*, *Neville & Macnamara's Railway Cases*, and the *Weekly Notes*. The cases themselves, as in the previous Digests, are lucidly and comprehensively digested, and every Report where they may be found is referred to. A series of works of reference like these is an undeniable boon to the Practitioner.

Alphabetical Reference Index to Recent and Important Maritime Law Decisions. Compiled by ROBERT R. DOUGLAS. Stevens and Sons. 1888.

This small work is of the most useful character. The subjects are ranged in alphabetical order, so that any particular point desired can be found at once. Under each subject is given a list of decisions. Nearly all the recent decisions are there, and many of the more important among the less recent cases. Each decision commences with a heading, stating the matter *sub judice*. Then comes a short statement of the facts, and the weight of legal authority for and against the decision arrived at; then the decision itself; sometimes the identical words of the Judgment are set forth, and always the name of the Judge or Judges, and the date of the decision and reference. Each reported case is skilfully condensed, and, in our opinion, considerable judgment is shewn in the selection of cases, and the amount of space allotted to each. To the important heading of "Collision" there are devoted no less than 18 pages out of a work containing in all 240 pages, and we have not observed under that heading any omission of a case deserving mention. We note that under the heading of "Cargo Claims," a concise statement is made of the recent important case of *Hamilton, Fraser & Co.* v. *Pandorf & Co.*, where the House of Lords (consisting of six Judges, whose names are given), unanimously reversed the decision of the Court of Appeal, restoring that of Lopes, J., to the effect that damage to a cargo by rats is a peril of the sea within the

contemplation of both parties to a contract of affreightment. Further, both under the heading of "Cargo Claims" and under that of "Deviation," a conspicuous place is allotted to the case of *Scaramanga* v. *Stamp*, on the subject of "Deviation to Save Life," with the notice of an American case, *Crocker* v. *Jackson*, with which, it is remarked, Cockburn, C.J., one of the four Judges of the Court of Appeal who decided the English case, entirely concurred. Taken as a whole, Mr. Douglas's work will be most valuable to the class for whom it purports to be designed, namely, mercantile men.

Codification of Sheriff Court Acts, with Draft Bill consolidating the existing Acts and Regulations affecting Sheriff Court Procedure in Scotland. By GEORGE B. YOUNG, Member of the Faculty of Procurators. Glasgow: Wm. Hodge & Co. 1885.

Valuable historical information concerning the Scottish Shrieval Jurisdiction, our readers will remember, was contributed in the *Law Magazine and Review*, No. CCXLI., for August, 1881, by Sheriff Lees, in an article on *Sheriffs and Sheriff Courts in Scotland.* The volume now before us constitutes an attempt to condense into the form of a Code the effect of about thirty Acts of Parliament relating to Procedure in the Sheriff Courts of Scotland. Civil process is alone dealt with, the procedure relating to the Criminal Jurisdiction of those Courts forming no part of the scheme. The author presents his proposed Code in the form of a Bill, "The Sheriff Courts Consolidation Civil Code (Scotland) Act;" and it is divided into thirteen parts, these again being sub-divided into sections, numbered consecutively from the commencement of the Bill.

The Draft Bill is preceded by an Introduction containing general remarks as to the Codification of legal enactments, and also an Explanatory and Methodical Statement of the provisions of the Bill itself. There is added a Schedule of Forms, but these, we are warned, are not copied from those in current use, being merely suggested variations, which the practitioner may admire, but which he must for the present avoid. The author claims that the Code proper is really a Digest and a "reliable guide to what are now the statutory regulations regarding Sheriff Court process," and in order that this allegation may be from time to time verified, the various

sections of the Draft Code have at foot a reference to the sections of the Act of Parliament so repeated or condensed. Without professing to have made an extensive comparison between the statutes thus referred to, and their compressed rendering in the Code, it may be granted that the condensation has been satisfactorily performed, and the order and classification conveniently framed. With regard to the immediate use of the "Digest," we do not understand Mr. Young to say that the mere fact of the various sections of his Code having their authority at foot justifies the practising advocate in relying on his handy volume alone. For though he says that to the "active practitioner in the Sheriff Courts the present work will be a *vade mecum* of the existing Statutes and Acts of *sederunt* contained in one handy Judicial Code," he does elsewhere imply that reference to the words of the Statutes themselves is necessary. Indeed, a slight examination of the Bill shows that the author's views of Legal Reform, indicated in his Introduction, have been embodied in the text; and that he does not always profess to state the Law as it is, but rather, as in his view, it ought to be. Certain sections are spoken of as "new," or as "Section 6 of Act of 1876, *varied*," "latter part entirely new," and so on. We take it, therefore, that the main intention is declared in a passage in the Introduction, where our author states that his Draft Bill or Code is a mode of submitting his views on the Codification and Amelioration of the procedure in Sheriff Courts, "with the view of evoking professional opinion on the various matters dealt with;" and the portion of the Profession he has particularly in view is that of which he is himself a Member, the Procurators practising in the Sheriff Courts. As such, it is a work well worthy of examination; the advantage of such a specimen Code to high legal officials engaged in drafting a Government measure of this character is very obvious, and Mr. Young deserves our best thanks for the service he has rendered in a possible Codification of the Future.

As having a practical bearing upon such possibilities, we may remark that notice has lately been given of the following Bills in Parliament by a private Member:—Bill to amend and extend the Law relating to the Recovery of small debts in Scotland; Bill to combine in one Code the regulations affecting Sheriff Courts in Scotland, and to extend and amend the Law of Civil Process therein.

Every Man's Own Lawyer. By A BARRISTER. Crosby Lockwood and Son. Twenty-sixth Edition. 1889.

My Lawyer. By A BARRISTER-AT-LAW. Kegan, Paul, Trench and Co. Twenty-first Edition. 1887.

The two works before us claim to train up the householder in the way in which he should go—that is, to lay down directions for his guidance how to avoid the legal Scylla and Charybdis. The writer of *My Lawyer* informs us in his preface that he it was who edited the first twenty-one editions of *Every Man's Own Lawyer*, while the present Editor of the last-named work tells us that the entire reconstruction and revision of *Every Man's Own Lawyer* was entrusted by the Publishers to a Barrister "of large and varied experience in Law, Literature, and Parliamentary drafting." We always hail a reconstruction with pleasure, when it is well carried out, but in the present case, we regret to say, that the reconstruction has led to what we can only call a heterogeneous conglomeration. The cards have been shuffled, but not sorted. Thus, under the head "Criminal Law" we find Actions of Trespass to land and to the person, Sales in Market Overt, Actions for Seduction, and Actions of Trover and Conversion. We fancy it will be startling, even to a layman, to learn that any of these are crimes; whilst a lawyer will receive the information with the smile of Gibbon's Philosopher. Under the head "Tithes," p. 627, a string of no less than eighteen Statutes, taken apparently from the Chronological Index of Statutes are put as a heading, occupying three-fourths of the entire page. This elaborate heading is followed by a most meagre and obsolete statement of the Law (so far as modern requirements are concerned) taken *verbatim*, it would seem, from an old edition of Blackstone's *Commentaries*, and not a word of modern law is stated on the subject, although it is one to which a special Appendix was devoted in the Third Edition of Taswell-Langmead's *English Constitutional History*, and which may rank as one of the "burning questions" of the day. The same observations apply to "Burial Boards," p. 612, and many other "Parts" of the work In other parts of the same, on the other hand, whole Statutes are showered on the layman nearly *verbatim*. Under the title "Actions in the High Court," the Law is stated from the *Old* Rules of Procedure, which have been superseded since 1883, and so on throughout the book,

wherever extracts are given from the Rules of Procedure. they are taken from the now useless and obsolete Rules. This is a really serious and, indeed, unpardonable blunder, and leads us to fear that the so-called reconstruction and revision may turn out to be but a snare and delusion. We are sorry to remark that the Law of Landlord and Tenant, at pp. 371 to 413, contains a deal of obsolete matter; many sections of the Agricultural Holdings Act are set out without condensation or abridgment; the Law of Easements, with the single exception of the case of *Sturges* v. *Bridgman*, decided in 1879, is not corrected; and the same may be said of many other subjects throughout the book. At p. 331 the old case of *Roach* v. *Reed* (2 Atkyns) is referred to as 2 A.H.C. 469. What such reference means we are unable to conceive, such reports as A.H.C. being unknown to the Legal Profession. The cover itself calls for some criticism with regard to the delusive phrases emblazoned upon it, viz., "No more Lawyers' Bills" and "Six and eightpence saved at every consultation," statements which, on study of the work, do not appear to be in harmony with facts. On turning to the other work here under notice, we find it far less pretentious in style than the former, although a large gilded key on the cover might well be dispensed with in future issues. The book is printed on much thinner paper than *Every Man's Own Lawyer*, but is less bulky, and the pages contain more matter. What, however, is far more important to us is that it contains matter which is really trustworthy as far as it goes. It is a relief, after turning over the pages of *Every Man's Own Lawyer*, to find that *My Lawyer* has not followed suit, but is well and concisely worded, and we are glad to be able to say that we have not discovered a single mistake of law in the entire volume, though filling upwards of five hundred pages. We wish we could say that it was free from omissions. These we find principally in the Law on the Distribution of the Estates of Intestates, the Law of Mortgages, and some matters of Parish Law. Where *My Lawyer* has fallen short of our standard, the deficiencies will, we hope, be supplemented in the next edition. Taken as a whole, we cannot help wishing success to this erudite book which bears so many traces of industry and diligence, and which bids fair, with proper attention, to pass the earlier work in the race for public favour.

THE
LAW MAGAZINE AND REVIEW.

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I.—EXPERIMENT IN LEGISLATION.

THERE are two kinds of enquiry in Politics. The aim of the one kind is to find the effect of a given cause, of the other the cause of a given effect. The practical politician whose object is, or ought to be, the good of the nation, is concerned mainly with the first. It will therefore be of great advantage to him if he is able to create his own causes, as it were, to prepare and isolate his own phenomena, for the purposes of inference. In some sciences this of course is very easily done. The chemist takes one substance, mixes another with it, and observes the effect; perhaps for the sake of greater certainty repeating the experiment, but being sure after a sufficient number of repetitions that the same effect will always follow from the same intermixture. Can anything like this be done in Political Science? Are Politics an experimental science in the sense in which Chemistry is an experimental science? To this question various answers have been given. Down to recent times the answer would have been that none but on the one hand the *à priori*, on the other hand the Historical and Comparative methods of enquiry, could be used. Thus Plato derived his ideal Commonwealth purely from the conceptions of an *à priori* philosophy; it was a State in which the parts were in due harmony with one another, and this harmony was the result of accordance with transcendental laws beyond the limits of experience. With Aristotle the Historical and Com-

parative takes the place of the *à priori* method. His ideal Commonwealth, as far as we have it, is a combination of elements mostly derived from observation of the defects of previous political theories, and of the practical effects of actual political systems both in and out of Greece. It is only recently that it has been seen that political events are determined by natural laws in the same way as are physical facts. Vico, in his *Scienza Nuova*, was among the first to distinctly make this theory a part of his system, and he has been followed by Comte, Sir George Lewis, Herbert Spencer, and others. It would be difficult to put the matter more clearly than it has been stated by Condorcet, in his *Esquisse d'un Tableau Historique des Progrès de l'Esprit Humain*, in these words :—" Le seul fondement de croyance dans les sciences naturelles est cette idée que les lois générales, connues ou ignorées, qui règlent les phénomènes de l'univers sont nécessaires et constantes ; et par quelle raison ce principe serait-il moins vrai pour le développement des facultés intellectuelles et morales de l'homme que pour les autres opérations de la nature ? " A recent French writer, M. Léon Donnat,* has gone further and maintains that the future of scientific politics, to be of any value in practical Statesmanship, is dependent upon a larger use of the Experimental method.

Here, however, one must pause for a moment. The Experimental method will not solve all difficulties. It is, after all, only a subsidiary method. The course to be followed is to give experiment its place as a means of obtaining data for deductions, not to base political action wholly upon experiment and nothing else, for this would be to make the conclusions derived from it merely empirical laws. Experiment falls into its place to supplement generalisations founded on the

* *La Politique Expérimentale* (Paris. 1885). One of a series in the *Bibliothèque des Sciences Contemporaines.*

Historical and Comparative methods. Again it must be experiment of a particular kind. The place of scientific experiment in politics, says Sir George Lewis, is supplied by voluntary information. That is to say, the politician is dependent to a great extent on reports and statistics recording results not actually observed by himself. Other differences in the nature of experiment in physical and in political science, arising from the differences in the nature of the respective sciences, naturally suggest themselves. Thus, experiment in Politics cannot be made by any one, but must be undertaken by the State or some person or persons acting under its authority. Nor can it be profitably used in all cases. In Politics, as in Ethics, there are some principles so settled that they have become axioms, others which are still in the position of open questions, to be decided one way or another according to the balance of convenience. It is only with the latter, τὰ ἐνδεχόμενα ἄλλως ἔχειν, in Aristotelian language, that experiment can profitably deal. We require for the perfect Experimental method to find two instances which tally in every particular except the one which is the subject of enquiry.* This, of course, cannot be done in Politics, but an induction of some value may be drawn from prepared phenomena, if sufficient allowance be made for the immense complexity of social phenomena, for frustration of causes, for concurrence of causes, and for intermixture of effects; if, in short, it be treated as a science of tendencies and not as an exact science. An approximate generalisation is, in social enquiries, for most practical purposes equivalent to an exact one.† Sir George Lewis, in his *Methods of Observation and Reasoning in Politics*, acknowledges the value of experiment to this extent. "All new laws," says he, "are in the nature of experiments. They are not

* Mill's *Logic*, Vol. II., bk. vi., c. 7, § 2. † *Ib.*, c. 3, § 2.

indeed scientific experiments, but they are experiments made for a practical purpose, and they are regarded merely as provisional and tentative until experience has proved their fitness, and they are confirmed by the proof of practical success." The experience, too, should be, in Bacon's words, *experientia literata*, and not the mere accumulation of facts. This experience is given more readily by experiment than by observation. Experience, says M. Claude Bernard,* is nothing but "une observation provoquée dans le but de faire naître une idée." From this idea is framed a hypothesis, and this hypothesis is regulated and verified by further experiment. This is simply an expansion of Hegel's saying that after observation we proceed to frame laws.

The ends proposed by the statesman can, as a rule, only be obtained by Legislation. Legislation is Politics in practice, it is the Art of which Politics is the Science. The United Kingdom holds a specially favourable position for the application of Experimental Legislation. It is an aggregation under one monarch of races differing in intelligence, in religion, in legal traditions, in circumstances of life, and even in language. What is a matter of course in England is known by unhappy experience to be intolerable in Ireland. Scotland may treat with indifference what England regards as a vital part of Civil Procedure, such as unanimity of the jury. The necessities of the case have thus led to a modification of the unbending and centralised system of Legislation which is the rule on the Continent of Europe. It will be found to be very frequently the case that, in the United Kingdom, Legislation originally applying only to one of the kingdoms has been gradually adopted in the others. Such a course would not be possible in most modern states. M. Donnat

* *Introduction à l'Etude de la Médecine Expérimentale.* (Paris. 1865.)

deplores the growing tendency to centralisation in France, and is ashamed rather than proud of the well-known boast of a French Minister of Instruction that at a given hour on a given day every child in France was saying the same lesson. In Germany the prevailing view of the Historical School of Jurists, that Law is begotten by the spirit of the people, exists potentially anterior to its manifestation, and is independent of individual will, must be a serious obstacle to the recognition of the Experimental method. The States with most resemblance to the United Kingdom in the character of their Legislation seem to be the United States and Switzerland. They will be considered more fully later. Suggestions have recently been made in France by M. Yves Guyot for applying the method to the suppression of *octroi* and to the separation of Church and State. The United Kingdom, as has been said, offers exceptional advantages for the use of Experiment. At the same time, it is to be noticed that many, if not most, of the examples to be adduced are examples of unconscious rather than conscious Experiment :—καὶ παρ' ἄκοντας ἦλθε σωφρονεῖν. One of the points which most forcibly struck M. Donnat in his enquiries in Europe and America was this unconscious Experiment, which he regards as a very valuable preparation for conscious Experiment and as a safeguard against hasty Legislation.

We may now proceed to examine more in detail the character of the legislation of the Parliament of the United Kingdom from its experimental side. In ordinary cases an Act of Parliament is universal,—that is, it binds every subject of the realm,—and of perpetual obligation,—that is, it is law until repealed or amended. There are, however, certain cases in which laws have been passed which carry with them an obligation of a more limited nature. The limitation may be of several kinds. It may be in time or in place, or it may be by the machinery of suspensory,

permissive, or indirect Legislation. These divisions call for consideration in detail.

(1.) *Time.*—An Act may be limited in its operation to a certain time, either by express words in the Act itself or by implication. The distinction between temporary and permanent Legislation is a very old one, and was expressed at Athens by the distinction between ψήφισμα and νόμος. We have no such variety of name. All are alike Acts of Parliament. Acts in the nature of new departures in the Law of an important kind are frequently limited in time, very often with a view of gaining experience as to the practical working of a new system before the Legislature commits itself to final legislation on the subject, sometimes, no doubt, by way of compromise with the Opposition, objecting to the passing of such a measure at all. Limitation in time often occurs in old Acts. Instances are the first Act of the first Parliament of Charles I. (1 Car. I., c. 1), forbidding certain sports and pastimes on Sunday, and permitting others. The Book of Sports of James I. had prepared the mind of the people for that more liberal observance of Sunday which had been so offensive to the Puritans of Elizabeth's reign, but it had not been down to that time acknowledged by the Legislature. This was now done in 1625, the Act was passed for the then Parliament, continued from time to time, and finally (the experiment having apparently succeeded) made perpetual in 1641. Another instance is the Music Hall Act of 1752, passed, it is said, on the advice of Henry Fielding, in consequence of the disorderly state of the music halls of the period, and perhaps still more on account of the Jacobite songs sometimes sung at such places. It was passed for three years, and, having apparently put an end to local disaffection, was made perpetual in 1755. Modern instances are the Ballot Act, 1872, passed originally for eight years, and now annually continued; the Regulation

of Railways Act, 1873, creating a new tribunal, the Railway Commission, passed originally for five years, and annually continued until made perpetual by the Railway and Canal Traffic Act, 1888; the Employers' Liability Act, 1880, a new departure in Social Legislation, expiring on the 31st December, 1887, and since annually continued; and the Shop Hours Regulation Act, 1886, a similar departure, expiring in 1888, and continued for the present Session. Most Acts dealing with Irish agrarian crime, being in the nature of exceptional repressions of the liberty of the subject, have been limited in their duration. Every Session an Expiring Laws Continuance Act is passed, continuing for a year, where necessary, Legislation originally temporary. Quite time enough seems to have been given for the formation of experience in some of these cases, for the earliest of these annually continued Acts dates from 1835 (5 & 6 Will. IV., c. 27). The Annual Army Act is a case of Constitutional necessity rather than of experiment. The expiration of an Act by implication is unknown to the strict theory of English law. A rule of law of this nature, however, exists in some countries. Locke in his Carolina Code provided that every law should expire by effluxion of time after a hundred years from its enactment. In Scotland old Acts of the Scottish Parliament may become obsolete from desuetude, but it is at the discretion of the Scottish Courts to declare whether an old Act in any case is obsolete or not. In 1870 the Lords of Justiciary held that the old Lord's Day Observance Acts, as far as they forbade the exercise of ordinary trades on the Lord's Day, were still in force.* In England, although in theory an Act of Parliament is always in force until expiration or repeal, there has been a tendency on the part of the Courts to interpret old laws, such as the Acts against blasphemy, with a view to the changed circum-

* *Bute v. More*, 1 Couper, Justiciary Rep., 495.

stances of society.* A certain power of what Mr. Justice Stephen calls "quasi-legislation" is thus, within narrow limits, left to English Judges.† Temporary legislation is carried much further by the States of Jersey than it is by the Parliament of the United Kingdom. Laws valid for three years are now passed by the States, in pursuance of an Order in Council of 14th April, 1884. This had frequently been done previously in order to avoid the necessity of obtaining the sanction of the Privy Council to temporary laws, as was necessary in the case of permanent laws. Without the assent of the Crown in Council they became *périmés* after the lapse of three years.‡

(2.) *Place.*—It is in this respect that the Experimental method of Parliament is most conspicuous. A law is enacted binding only locally, and is sometimes extended to the whole or a part of the realm, sometimes not. The old Statute of *Circumspecte Agatis* (13 Edw. I., stat. 4) passed in 1285 is one of the earliest examples. The point of importance in it is that it was addressed only to the Bishop of Norwich, but afterwards seems to have been tacitly admitted as law in the case of all dioceses, having probably been found to have worked well at Norwich. It was not unlike the Rescripts of the Roman emperors, which, primarily addressed to an individual, afterwards became precedents of general law. Want of space will not allow more than the briefest mention of the numerous and important matters in which Legislation differs for the three kingdoms. Among others are Land Tenure, Judicature, Education, Public Health, and Church matters (Disestablishment, Tithes, Patronage, &c.). The Irish Land Act, 1881, is a good example

* See the summing up of Lord Coleridge, C.J., in *Reg.* v. *Ramsay and Foote*, 15 Cox Crim. Cases, 231. [Cf. *Law Magazine and Review*, No. CCLIII., for August, 1884, Art. *The Blasphemy Laws*, by H. J. W. Coulson.—Ed.]

† *Reg.* v. *Coney*, 8 Q.B.D. 551.

‡ Le Cras, *Const. Hist. of Jersey* (Lond. 1839), p. 310.

of the adoption of a local law which had been successful in a limited area. By the Land Act of 1870 the Ulster tenant-right was acknowledged by statute, and the Act of 1881 extended a similar right to the whole of Ireland. Sunday closing of licensed houses affords another good instance. Scotland was the first of the kingdoms to adopt Sunday closing by the Forbes Mackenzie Act of 1853 (16 & 17 Vict., c. 67). Ireland followed in 1878; Wales in 1880. What is important in these Acts is, that they are not at all on the same lines. Each is drawn with reference to the wishes of the particular country in which it is operative. The Irish measure, for instance, is simply an experiment; it was passed for four years and is now annually continued. The houses, too, in the five largest towns of Ireland are open for a limited time. The Welsh Act is perpetual and allows no opening of houses in the large towns. Bills have been from time to time introduced for experimental Sunday closing in Cornwall, Durham, and Yorkshire, but hitherto without success. The passing of one of them might provide valuable data for the adoption or rejection of a larger measure. It is to be observed that while all this experiment is going on, there is at the same time a tendency of considerable force in the opposite direction, that is, towards the abolition of local differences in law. The Weights and Measures Act, 1878, following the lines of s. 27 of *Magna Charta*, and of an Act of 1824, has practically abolished all the interesting old local weights and measures, such as the Winchester bushel and the Cheshire acre. The Yorkshire Registries Act, 1884, combined into one the different rules as to land registry which had existed for over a century in the three Ridings of Yorkshire. Local rights are occasionally tenderly preserved in general Acts. Thus the Larceny Act of 1861 (24 & 25 Vict., c. 96), made it a crime to kill rabbits in a warren, but excepted the case of rabbit-killing on the foreshore in Lincolnshire. The jurisdiction

of the Chancery of Lancaster has always been preserved in Acts dealing with the reform of the Judicature.

(3.) *Suspensory Legislation.*—This takes effect in but few instances in the United Kingdom. It is the exercise by Parliament of the old right of dispensing with the force of a statute (dispensation *non obstante statuto*) claimed at one time as a part of the Royal prerogative and abolished as such by the Bill of Rights.* One instance is the Militia Ballot Suspension Act. The militia was formerly recruited by ballot under the powers of various Acts. These Acts are still in force, but the Suspension Act, passed for a year in 1865 (28 & 29 Vict., c. 46), and since annually continued, has obviated the necessity for the ballot as long as voluntary enlistment may be found sufficient for keeping up the strength of the militia. In case of a decrease in the strength of the force or of a serious war, the Suspension Act would probably cease to be continued, and in that case the old Acts would remain in full vigour. The effect of Suspensory Legislation may also be attained by the Government making it known that it will not enforce the penal provisions of certain Acts. By this means a true political experiment has recently been made in the suspension, under certain restrictions, of proceedings for penalties under the Acts forbidding the cultivation of tobacco in England.

* [Dispensation *non obstante statuto* seems to have been a Crown prerogative, imitated from the practice of the See of Rome in its *non obstante* Bulls. The Suspending power, as ordinarily understood, Taswell-Langmead, *Eng. Const. Hist.*, 3rd Ed. (1886), p. 316, calls "incompatible with the existence of Constitutional Government." This, of course, was a power claimed by the Crown, as inherent in the Body Politic of the Sovereign, and would therefore seem to be a different power from one exercised, theoretically, by the two Houses of Parliament in conjunction with the Crown, and, practically, by the House of Commons. Moreover, the Dispensing and Suspending powers, though generally classed together in Constitutional Treatises, appear to be, in their essence, two distinct powers.—Ed.]

(4.) *Permissive Legislation.*—This is an extremely frequent and valuable means of experimental legislation. It may be used both in Substantive and Adjective Law. To take the latter first as the least important, it is an axiom of English law that a Statute creating a new procedure does not supersede the old procedure without express words. Thus a prosecution for perjury may be either at Common Law or under 5 Eliz., c. 9. So where a new felony or misdemeanour is created, the procedure is by indictment unless the creating statute provides some other means. In the case of Ritual offences by the clergy, falling within the Public Worship Regulation Act, 1874, proceedings may usually be taken under either that or the Church Discipline Act at the option of the promoter. As to Permissive Legislation in the case of new rights, there is a large number of Acts which may be adopted or not at the option of those immediately interested. Examples are certain clauses of the Towns Improvement Clauses Act, the Scotch Police and Roads and Bridges Acts, the Land Transfer Act, and specially worthy of notice, the Acts dealing with Colonial Federation, the British North America Act, 1867, the South Africa Act, 1877, and the Federal Council of Australasia Act, 1885. Here the advantages of experiment become unusually obvious. The position of a town which has adopted the improvement or police clauses, or of a highway authority which has abolished tolls, can be at once (subject to the cautions already mentioned) compared with that of one which has not done so; the Land Transfer Act can be shewn to have been so complete a failure that some new scheme, whether of compulsory or voluntary registration of title, must be put forward as a fresh hypothesis; a colony, such as Newfoundland, which has not adopted the Federation scheme, can watch the effects of the scheme upon those which have done so, and shape its course accordingly. The question of registration of title,

as far as regards the Colonies and the American States, is instructive. The Torrens system was introduced by Sir R. Torrens in South Australia in 1858 as a permissive measure. So successful was the experiment that there is now, as it appears, hardly any land in that colony not under the system, and the system has been gradually adopted since 1858 by colonies as far apart as New Zealand and British Columbia, and by some of the States of the American Union. Another interesting example of Colonial experimental legislation is the Canada Temperance Act, 1878. A county or city may prohibit the sale of intoxicating liquor for three years, after which, on petition by one-fourth of the electors, the question may be again submitted to the decision of a general election.* It is to be noticed that in permissive as in local legislation there has been in some recent cases a withdrawal of option and a return to compulsion, where experience has shewn that the permissive legislation was, in the opinion of the Legislature, futile or mischievous. The Agricultural Holdings Act, 1875, was permissive, that of 1883 is compulsory; the Bankruptcy Act, 1869, gave the creditor the option of more remedies against the property of an insolvent debtor than does the Act of 1883.

(5.) *Indirect Legislation*.—By this is meant the power of Courts of Justice to frame rules of procedure, or of the Crown in Council, or of Local Authorities to apply where necessary the provisions of general Acts to particular districts. A familiar example is the prohibition by such authorities of fairs or of removal of cattle in infected districts. The powers are general and are given by an Imperial Act, the putting of them into force in a particular

* This Act was held by the Privy Council in 1882 to be within the competence of the Dominion Parliament, *Russell* v. *Reg.*, 7 App. Cas. 829. A similar Act was held in 1884 to be within the powers of the Legislature of Ontario, *Hodge* v. *Reg.*, 9 App. Cas. 117.

instance depends upon the discretion of the Local authority. Another example is the making of by-laws by a Municipal Corporation or a County Council under the powers of the Municipal Corporations Act, 1882, and the Local Government Act, 1888.

After this examination of what is consciously or unconsciously done in the United Kingdom to promote the cause of the Experimental method, it will perhaps not be unprofitable to compare similar methods in the United States and Switzerland, both countries being, like the United Kingdom, in an exceptionally favourable position for the method. Each consists of a federation of States or Cantons, independent for the most part in their internal government, and only subject to the Central Government for purposes, broadly speaking, of National defence, Foreign policy, and Revenue.

In the United States, provision against ill-considered legislation is made in several ways. (1.) The veto of the President is not a merely nominal right, like the refusal of the assent of the Crown in the United Kingdom, but is largely exercised, especially by a strong President. (2.) No Bill can be introduced into the House of Representatives until it has been considered by one of the Standing Committees of the House. (3.) The Supreme Court of the United States or of the several States has power to declare a United States or State law unconstitutional and therefore not binding.* The next safeguard specially illustrates the Experimental method. (4.) It is provided by the Constitutions of many States of the American Union that there shall be periodical revisions of the Constitution. Fifteen States adopt the principle as part of their Constitutions, in others it is recoguised by law.† For instance,

* This may also be done by the Courts of some of the Colonies. The Canadian Acts just referred to afford good examples.

† Bryce, *American Commonwealth* (Lond. 1888), Vol. II., p. 32.

by Art. 13 of the Constitution of the State of New York, every twentieth year, and at such other time as the Legislature may provide, the question "Shall there be a convention to revise the Constitution and amend the same?" has to be decided by the Electorate. This course is obviously calculated to incorporate the results of Experiment in the fundamental law of the State. The United States afford several other instances of Experiment. The Homestead Laws and the Electoral Laws dealing with proportional and minority representation have been gradually adopted by State after State with the necessary modifications. Thus the amount of property protected by the Homestead Law is, as might be expected, generally smaller in the Eastern than in the Western States.

The most distinctive features of the Swiss Constitution are the *referendum* and the *droit d'initiative*. The former illustrates the Experimental method in this way, that it has been adopted gradually. The Grisons and Valais seem to have possessed it from time immemorial, and it has been copied from them by the other Cantons, with the exception of Freiburg and those where the old *Landsgemeinde* exists, as Uri. The *referendum* is of two kinds, *obligatoire* and *facultatif*. The first is the reference, necessary by the Federal Constitution, of laws of a particular kind (especially revisions of the Constitution) to the Federal or Cantonal Electorate for acceptance or rejection. The second is the reference of any measure to the popular vote provided that a fixed number of electors within a given period duly demand the reference. The number requisite for a Federal *referendum* is 30,000 citizens or eight Cantons. The *droit d'initiative* is the right of a certain number of the electorate to have a measure submitted to the Federal or Cantonal Diet, with a further right of *referendum* in certain cases on rejection by the Diet. It is obvious that these provisions make it almost impossible for the Federal or Cantonal

Diet to be for any length of time out of harmony with the electorate. They also offer special advantages for the application of the Experimental method. The case of Capital Punishment illustrates this. It was abolished by *Zurich*, followed by other Cantons, and the abolition was confirmed by the present Federal Constitution of 1874. On a *referendum* a modification resulted, and the article of the Constitution now only provides that Capital Punishment shall not be inflicted for political crimes. Some Cantons have by experience changed their views and re-introduced the death penalty. Its abolition was an experimental and tentative measure, and was not regarded as universally successful.*

The main advantages of Experiment in Politics may be shortly summed up thus:—(1.) It operates as an almost self-regulating mode of avoiding what Bentham calls "the fallacy of irrevocable laws." It is more philosophical, as well as more convenient, than the perpetual repeal and amendment which have made the Statutes of the Realm a trap for the unwary unless they are provided with all the latest expedients for safe guidance. (2.) The Permissive method, in particular, acts as a kind of Equity, which, like the Lesbian rule, can be bent to suit all circumstances with a pliancy to which the unyielding rigidity of an ordinary compulsory Act is a stranger. (3.) The Legislator, by recording the results of experiments, will be able to come with more knowledge to the consideration of a general compulsory Act or the discontinuance of Legislation altogether, whichever may be the better course in the particular case. (4.) The educational value of the Experimental method will be considerable. The people will be educated by their own legislation. Even as it is, the interest of the people in political problems, and their acquaintance

* See Adams and Cunningham, *Swiss Confederation* (Lond. 1889), chaps. vi. & xvii.

with the arguments for and against a new departure in Legislation, is probably greater in the United Kingdom than in any other country. This result is mainly due to the existence of the method, imperfect and impartial as it may be, to a more considerable extent in the United Kingdom than elsewhere. It is almost with despair that M. Donnat in his book contrasts results attained in the United Kingdom, and its more flexible system, with the centralised despotism of French officialism.

JAMES WILLIAMS.

II.—THE REASONABLE MAN AT COMMON LAW.

[*** The following Paper contains the substance of a Lecture delivered by F. T. Piggott, Esq., M.A., LL.M., before the English Law School, Tokio, and is printed, with revision, from the text, as given at the time in the *Japan Weekly Mail* (Tokio), for June 22nd. We are glad of the opportunity at once of welcoming to our pages a former valued contributor, and of placing on record the doings of the English Law School in the capital of Japan.—ED.]

I HAVE accepted, with the greatest possible pleasure, the invitation of your President to address you to-day; but I will freely confess that that pleasure has not been wholly unalloyed, for, giving me the entire range of Law, he desired me to choose my own subject. Thereupon a whole army of subjects presented themselves for my consideration; there came flitting by me ghosts of ideas which once had half-persuaded me to discuss them, but which had died of inanition when my good intentions had sunk into the pavement of the nether world. I was tempted to talk to you of the history and tradition of our

law, and to excite your admiration for a system which compels us to seek its doctrines in books written in a quite forgotten language, and in characters which have long since passed into obscurity and which only those may read who loiter by the way. Or to expatiate to you on the subtle beauties of a Law whose perfect whole is divided into two parts, that which is known, and has already been expounded, and that which is only unknown because the occasion for its exposition has not yet arisen. The charm and perfection of the matter is that this unknown part always remains the greater; fifteen years' study finds me not much further from the threshold than you who have but just opened our text books. Yet this unknown law is a written law, as you well know, the roll of it being variously and curiously described as "The Clouds," or "The Judicial Bosom." I was tempted, too, to discuss the merits of an unwritten law as compared with those of a Code but though I can scarcely avoid touching on the question, I am in public duty bound to say nothing that should in any way tend to make you dissatisfied with the great projects of your Government in the matter of Codes, even if I thought, which assuredly I do not, that there existed any better way of dealing with so momentous a national problem. Again, I was tempted to unravel for you some of those written mysteries which are to be found in what is facetiously termed "The Statute Book," but which after much patient revision and excision of dead parts is hardly to be contained in five-and-twenty very ponderous and portly volumes: but I could do nothing which should in the slightest degree incite the *principes* and *sapientes* of this Eastern Kingdom to follow the example of the British legislator who makes of the path of duty a labyrinth wherein not even the wariest can walk with safety. I trust that the Japanese lawyers will never have this means furnished to them for growing rich. But because I am an

English lawyer who is not a little proud of his law, and because you are Japanese who are eager to study it, I felt that I must talk to you somewhat more specifically of the great Common Law of England. For in spite of the cohort of Continental lawyers who, most harmoniously, I feel sure, have assisted your own lawyers in the perfection and elaboration of your new Codes, I believe that the study of English Law, in the peculiar method of its training, will work for much good to you who have willingly subjected yourselves to it; and, in the results of that method, when you have attained the goals of your ambition, will work for infinite benefit to the community, who will derive assistance and receive judgment at your hands. I mean in this to pay something more than a passing compliment to your school. I believe, that when that good time comes, and your Sovereign looks for "such as know the law and mean duly to observe it," to represent him in his Courts, and to do the right on his behalf between his people, between those who owe him full allegiance and those who owe him temporary allegiance, he will choose many of them from among those who have studied English law in this school and have received their diplomas from its distinguished Professors. For the peculiar methods of thought which the duty of ascertaining the law applicable to any given set of circumstances under an unwritten law imposes, are those which go far to make up the qualifications of a good Judge. Every case that presents itself for opinion comes as a problem in favour of whose solution either way there are instances without end to be cited. An acute advocate could argue for either side, citing case upon case in favour of his various contentions; but the advice which he has to give in his chambers upon the case, and the judgment which the Judge has to pronounce upon it from the bench, demand equally a calm and dispassionate holding of the balance between the conflict of opposing analogies. And therefore it is that

the Judicial habit of mind has to be assumed by English lawyers with the very first brief which it is their good fortune to be entrusted with.

The soul of English law finds expression in one word, Precedent: and I believe that the rule of law is stronger when it is based on a law of precedent than it is when it depends on a law of rules. Precedent must always be weak when the Court seeks the law in the rule and not in the example. The form in which a case presents itself to the mind of the Judge is: does the case come within a given rule of law? He is disinclined, unless he is obliged, to look at other cases to which other Judges have applied the rule. With us the question is: does the case come within such and such an interpretation of a given rule? The Judge is bound to follow in the steps of those of equal or higher degree who have had the same question before them. And if, as I was half persuaded to, I had made my address to you one "in praise of English law," I should have set this rule of Precedent in the foremost place. For it is in this respect, I believe I am not wrong in saying, that the administration of English law differs so considerably from that of the law of other European nations. Again, I come back to that interesting question, what influence can the study of English law have on Japanese law? I have answered it once: it will train good Judges. I now give a second answer: it may help to make the rule of Precedent the guiding principle for the interpretation of the Codes.

I propose, however, to discuss with you to-day the spirit of the English Common Law.

And to this end I shall talk to you about a most interesting person who is the creation of that law and who probably is not altogether unfamiliar to you; he is called the "reasonable man." His character, however, is not yet fully developed; and the reason for this will be apparent

from what I have already said: but the Courts are busy the year through, the long summer days excepted, in perfecting it. Not a day passes but some fresh quality is added to, or some fresh example is given, of his already delightful character. Who and what is he? He is a man only of average intellect and intelligence, and not transcendently wise. He is very human: his wisdom is only of the common worldly sort; he cannot foresee the unexpected; though he learns from past experience, he is not one of whom we say contemptuously he is wise after the event; acting circumspectly himself, he is not extreme with his neighbours, requiring them to be more than careful; he begs them only to act circumspectly too; he is most particular not to do harm to his fellows deliberately; and when he does injure them we cannot blame him, for we know that it must have been from sheer necessity, or that it was unintentional, and that things could scarcely have happened otherwise. Indeed, he will often avoid causing people trouble which after all every one would have said had served him right. Do you not recognise him in this sketch? Let me fill in some details from some very familiar examples of his behaviour in every day life. He sees a donkey tied up in the middle of the Ginza, and tied up too by some very careless person; he does not drive over it, you may be sure; he will avoid it if he possibly can and so spare the donkey's feelings, its master's purse, and his own carriage. When he orders a workman to come to his house to repair the paper of the *shoji*, he will be careful not only to tell his boy to close the trap-door in the passage, but he will see to it himself lest the workman should be unfortunate enough to trip over it. If he is stopping at the Fujiya at Miyanoshita, he will not ask a pretty *nasan* to fetch the gun he has left upstairs, unless he is quite sure that it is not loaded: does he not know that *nasan* are inquisitive little maidens? and it would be cruel, unwise, unreasonable, to put so frail a

daughter of Eve (Isanami is, I think, our first mother's Japanese name) in so imminent and great a danger. He digs a well close to the highway. He knows that many people come and go along it by night and day, and some less warily than others according to their nature: and though the well is in his own plot of land, he is careful to fence it round lest the unwary stumble and fall into it. And if he speaks of others concerning their credit he will speak discreetly, saying only such things as he knows or believes to be true, lest the person who has questioned him should act to his own or to that other's detriment. But sometimes in this matter of spreading evil report, a sense of duty will compel him to speak, though he is not sure that the report is true; yet in such cases, he will speak without malice, and only to such persons as have a direct interest in knowing the report whether it be true or false. And no less particularly, he keeps his savage dog securely chained up, lest it rush out and bite the passers by; his vicious horse is kept within his paddock lest it stray upon the highway and kick the neighbours' children at their play; his bridges that span public roads are well looked after, lest the mortar should decay with time, and the bricks, being shaken, fall on inoffensive heads; his wire fences are always in good repair lest his neighbours' cattle eat the rusty strands and die, or get through and, after their nature, fight his own beasts so that both are injured. These and such like things you know the reasonable man will assuredly do. But as I have said he is only a reasonable man, not a very reasonable man; and therefore there are many things which you cannot expect him to do. Thus, if he digs a well in his garden, but at some distance from the highway, he will warn those who come upon his land legitimately and whom he may expect to come there; but he will not necessarily fence it, for those who do not come there by his leave or on his business are trespassers, and with such he has no concern. He is

not careful of those who know of dangers and deliberately incur the risks. He does not fence in the roof of his house when he tells a workman to mend the tiles, or gives an artist leave to sit there to take a bird's-eye view of the great city below.

I think these few examples of the good he does, and the evils we cannot blame him for, will suffice to remind you of the position which this interesting personage fills in English law. His character is the model to which on all occasions we have to conform in our every day life and dealings with our neighbours. I say on all occasions deliberately, although, as you well know, in many parts of the Common Law the duties laid down are of a character more precise than that of conforming to what perhaps is after all only an imperfectly defined ideal. That part of the law which deals with contracts lends itself more readily to the formation of precise rules; in commercial affairs the circumstances of one case are often identical with those of another. What happens to-day when A contracts with B will happen to-morrow when B contracts with C, the next day when C contracts with D, and so on through the year and through the alphabet. So in the Law of Torts, concerning the many things which, alas, for poor humanity, are happening every day (in Europe, at least), the assaults and batteries, the frauds, the libels, the conversions, and the trespasses, it has been possible to lay down and elaborate many precise rules, which are practically the legal translation of the sixth, seventh, eighth, and ninth paragraphs of the Old Jewish Law; and when you study the law applicable to these special subjects, you are studying the thousand and one illustrations of the way in which these simple duties have been broken by the weaker brethren. You learn for example that a threat, even when there is no actual violence, may be an assault; that the least touching of another in anger is a battery; that to tell a tradesman

he may trust your friend whom you know to be insolvent is fraudulent; that to say of a barrister "he is no lawyer," is to slander him; that to withhold another's property amounts to a conversion; and that to walk in another man's garden is a trespass. But though these elementary rules of the Law of Torts, and the equally elementary rules of the Law of Contract, are simple, well-known and precise, they are none the less the rules by which the reasonable man will regulate his behaviour. They are not arbitrary, nor are they difficult either to understand or to conform to. In judging of men who have violated them, it is not necessary to make a direct appeal to our ideal, simply because long experience has taught us that they are of the very essence of his daily regard for his neighbours. But when you get away from these simple rules and begin, in either of the two great branches of the Common Law, to enquire more deeply into any of these special matters, to examine the limits and exceptions to the fundamental rules, you come at once to the appeal to the ideal, you find at once the question of right and wrong determined upon by direct reference to the standard of the reasonable man. Take for example so simple a case in the Law of Contracts as the interpretation of the rule you doubtless are very familiar with that "Time is not of the essence of the Contract": this means not only that goods must be paid for if they are delivered within reasonable time, whether as soon as they are wanted or not, but also that they need not be taken unless they are so delivered: "reasonable time" meaning, of course, the time which our friend the reasonable man, if he had the order, would have taken to deliver the goods. And so it is in the specific branches of the Law of Torts. Such a threat as "If you are not quiet I will blow your brains out" will be an assault, or not, according as the fear of bodily harm which it engenders is or is not reasonable. The law only allows a person assaulted to lay gentle hands

on his assailant; and if he is unreasonable in his defence he is himself guilty of an assault and battery. A statement made in answer to a question, as to a man's credit for instance, though untrue, is not fraudulent if the speaker had reasonable grounds for believing it to be true. The whole of that part of the Law of Libel which deals with privilege, and which exempts from liability those who speak what is false concerning others, makes the privilege depend on whether in speaking they have behaved reasonably or not. A conversion is justified if there were reasonable grounds for believing that the goods belonged to a third person. A trespass even is justified by necessity, which means nothing else than a reasonable necessity; as where a certain river overflowed and had rendered the tow paths impassable, the towers were held justified in going on to the adjoining field, yet only on that part of it next the river.

But these well-known and specific branches of the Law of Torts do not contain the expression of the whole duty of man to his neighbours. There is, as you well know, a very large portion of that law which, under the head of Negligence, deals with all those thousand and one complex incidents of daily life which give rise to what are called accidents, but as to which it is impossible to lay down any precise definitions of duty. The law does not say for example, and indeed it could not say, you may not drive a carriage through the street, in the same way that it says, you may not strike another; it does not say, you may not keep a restive horse in your field, in the same way that it says you may not walk in another man's garden. But what it does say is, if you do drive a carriage through the street, you must drive it carefully, that is without negligence; if you do keep a restive horse in your field, you must take proper precautions to keep him from straying out of it. A number of similar examples will occur

to all of you who have learnt the elements merely of the Law of Negligence. In the two that I have given, and in the many which you will remember, there occur certain expressions which, so far as ordinary language goes, are perfectly intelligible, but which, when we come to look more deeply into the matter, we find are wanting in the precision which ought to characterise legal language, more specially when it is dealing with matters so important as right and duty. These expressions are: carelessly, improperly, recklessly, negligently, and so on. But if the breach of duty be thus expressed, the duty itself must also be capable of expression in corresponding terms, thus: on such and such occasions to act with care, properly, heedfully, or without negligence. But what does acting properly mean unless there is somewhere to be found a standard of propriety? or, what does acting negligently mean, unless we know of some standard enabling us to draw a line on the one side of which will lie acts to be deemed wrongful as being done with negligence, and on the other side acts to be deemed not wrongful as being done without negligence? It is this standard which the English law supplies in the person of the reasonable man; and its broad canon of behaviour is, on all occasions, at all times, and in all seasons, to conform to this standard.

It is of the utmost importance that you should fully appreciate the way this standard is arrived at, and I beg your attention most particularly to this matter, as it is a little confusing, and many writers have not succeeded in making the principle perfectly plain. A very learned American author puts this case: "Suppose a blacksmith were to find a watch by the roadside, and discovering it to be full of dirt and gathering rust, should attempt to clean it and put it in order, and in doing so, though exercising the greatest care, should injure the watch; if we have to answer the question, did he

act as a prudent man in his situation might have done? the answer could not but be in the affirmative, for a watchmaker would have done the same thing." This does seem at first sight to be the result of the reference to an ideal. But in truth the answer would be in the negative. In the enquiries did this person act reasonably? or, did he act as a reasonable man would have done under the same circumstances? the point, as I understand the law, at which we wish to arrive is, assuming him to be a reasonable man, did he act reasonably or unreasonably on this occasion? To determine whether a blacksmith acted reasonably or not under certain circumstances, we do not compare his conduct with that of reasonable men in the abstract, nor with that of reasonable specialists in the concrete; but simply with reasonable blacksmiths. In enquiring whether that blacksmith did act reasonably or not, we are compelled, it is true, to set up an ideal; but it is an ideal blacksmith and nothing else. And so, to bring this question down to matters of more frequent occurrence, such as driving in thoroughfares, it seems clear that what would be reasonable for one might be unreasonable for another. For example what would be reasonable for a man who was skilled in the management of horses to do in an emergency, would very probably be unreasonable for one unskilled to attempt. The ideals would be, in the first case, the conduct of the reasonable skilled man; in the second, the conduct of the reasonable unskilled man. And generally, in order to determine whether what a man has done is reasonable or not, we must put in his place, and under precisely the same conditions, a reasonable man, and endeavour to ascertain what he would have done under the circumstances. If what the man in fact did does not conform to this standard, then the Law says that he has acted unreasonably, and is guilty of negligence.

The method by which the standard is arrived at is an

interesting one; both Judge and Jury have a share in determining it. The cases are easily divisible into three classes. In the first we find the Judge declaring that the case speaks for itself, that on the face of it the duty was clear, and therefore that no special evidence of negligence is necessary. As, where two trains come into collision, it is evident that some one has blundered, and it is for the defendant to show the contrary if he can. In the second class of cases we find the Judge declaring that on the facts before the Court there is no evidence of a breach of duty: these are cases which in common language we should call accidents. A man is driving slowly down the street on a dark night, another is crossing with all due care, but he slips and falls under the horse's feet. There is no negligence here and an action would inevitably end in a nonsuit. The third class of cases lies midway between the other two: and as to these I cannot do more now than state the rule by which they are governed, leaving it to you to trace its application in your private studies. It is the duty of the Judge to say whether any facts have been established by evidence from which negligence *may* be reasonably inferred: the Jury has then to say whether, from those facts, negligence *ought* to be inferred. So then you have these three classes of cases: those in which negligence *must* be found; those in which it *cannot* be found; and those in which it *may* be found: or, those in which it is clear that a reasonable man would not have acted as the defendant did; those in which it is equally clear that a reasonable man would have acted as the defendant did; and those in which it is doubtful as to how a reasonable man would have acted, and the assistance of a Jury (presumed themselves to be reasonable men) has to be invoked to determine the matter. I have given you in this sketch the merest outline of the law concerning reasonable men, but the outline would be incomplete if I

did not trespass still further on your patience and show you how the same idea runs through that branch of the law which you know as "Contributory Negligence." Many an accident is brought about through the carelessness of the injured person himself. If a man, for example, runs recklessly across a street in which there are many carriages, and gets knocked down by one of them, whose fault is it but his own? He will have to pay the doctor's bill himself. But this does not dispose of the whole matter. The Law, in requiring all men to conform to the standard of reason, requires it on all occasions, even when they have to deal with foolish and unreasonable people. A reasonable man, if it is possible, will avoid injuring even an unreasonable man. And therefore in the case I have supposed of a man running across a crowded thoroughfare, it is the duty of a driver, even though he is not driving recklessly, to pull out of the way if he can. If he could have avoided running over the man, and did not, the blame and the doctor's bill will rest with him.

Once again I must enunciate the rule and leave the application of it to you: first, a plaintiff cannot recover if with ordinary care he could have avoided the consequences of the defendant's negligence; secondly, a plaintiff can recover if the defendant with ordinary care could have avoided the consequences of the plaintiff's negligence.

Apply these rules for yourselves to the case of the donkey tied up in the middle of the Ginza, and you will find that under some circumstances, if the axle of the carriage is broken in driving over the animal, the donkey-man will have to pay: and under other circumstances, if the donkey's leg is broken, the driver of the carriage will have to pay. And if I held the brief for a poor little *nasan* who has been injured by the loaded gun she has been sent to fetch, and Mr. Masujima for the defendant should urge that

it was her own fault, that her inquisitiveness was to blame and not his client, I should answer him thus: it is the height of unreason first, to leave loaded guns about at all; and secondly, to send a not too reasonable, though delightful, attendant to fetch such a thing; thirdly, if he would do these things, not to foresee that what happened was almost inevitable, unless the little cherub who looks after the lives of *nasan* had providentially diverted the bullet in its course. I can see in your faces that his client would receive short shrift from you, were you his judges, and that O Kiku-san would get her verdict with substantial damages: and you may find good cause for your judgment if you learn with diligence those chapters in the Book of our Law, which are entitled "Contributory Negligence" and "Remoteness of Damage." This, then, is the substance of the whole matter. The English law in judging of men's behaviour whether it is right or wrong, refers it to an ideal, but not to a very lofty one. Having so much to do with the petty affairs of every day life, with the walking and the talking, with the driving along the streets, and the keeping of dogs and donkeys, it endeavours to ascertain and appreciate the springs which influence the smallest of human actions; it endeavours to understand the weaker as well as the stronger side of human nature, and with the materials thus gathered makes of its ideal quite a simple ordinary mortal; having to judge of things which happen in the by-ways as well as in the highways of existence, it endows him with the characters of those who saunter along village lanes, as well as those whose life is spent in the busy throng of cities. It does not insist on his leading the life of a recluse, rejoicing rather to see him mix with the throng, and going where his fellows most do congregate. And having thus created an ideal, it sets him to work to infuse a sweet reasonableness into the lives of men. His is a character which I think should be especially appreciated

by the Japanese, for, as you will have observed, in many things it much resembles theirs.

Let me, in conclusion, express a hope that those who administer your Codes, and those to whom your Constitution gives authority, will find you all, if not perfectly reasonable, at least not unreasonable men.

F. T. PIGGOTT.

III.—THE LITERATURE OF MARITIME LAW.

THE three most useful and important works, whose titles stand at the foot of this page,* coming so soon after our recent article on Maritime Law Books, shew at once the extent and the value of this branch of Law in a great Maritime State like England, and we regret that space only permits a brief notice of some of their most salient points. It is very satisfactory to meet with a book on a subject of the utmost importance to all those "who go down to the sea in ships and occupy their business on great waters," of which one has nothing but praise to say, and though we may feel regret that circumstances should have prevented our giving earlier notice of Mr. Marsden's second edition, we feel that even an absolute silence on the part of all reviewers could do no injury to a book whose merits are so apparent, and so well known to all those whose practice leads them to consider the Law of Collisions. *Marsden on Collisions* is not merely recognised as an authority in England, but is also

* *A Treatise on the Law of Collisions at Sea.* By REGINALD G. MARSDEN, Barrister-at-Law. Second Edition. Stevens and Sons. 1885.

A Practical Treatise on the Law of Marine Insurance. By RICHARD LOWNDES. Second Edition. Stevens and Sons. 1885.

The Law of General Average, English and Foreign. By RICHARD LOWNDES, Average Adjuster. Fourth Edition. Stevens and Sons. 1888.

often quoted in American, German, and Italian Courts, and always with approval, and those who know the book best probably value it the most highly. Already a demand is heard for another edition to give us the results of the decisions of the last few years, and though, unfortunately, its talented author has left this country for Judicial duties elsewhere, it is to be hoped he will find leisure to keep his book up either by fresh editions or supplements to date. The book is so clearly written that not only every lawyer practising in Courts of Admiralty, but every officer who is, or may be in charge of a ship ought to derive great benefit from its perusal. It would not be necessary for the officer to verify the references,—he may take them for granted—but it is of the greatest importance that he should have the principles laid down at his fingers' ends. When a collision is imminent there is no time to work a problem of mathematics sometimes of considerable complexity; but when these have been worked out at length and the results laid down by decisions of the Law Courts, it is very important for a ship's officer to know those results so well that to act in accordance with them becomes an intuition to be followed at once, without hesitation. It is clear that when a case has taken much argument and much consideration to decide, the circumstances must be such as to justify considerable *à priori* doubt as to what is the best thing to be done, and these doubts may and will recur whenever the same circumstances present themselves, but if we only know the way in which the doubtful case has been decided once for all, even though in our inmost hearts we may be guilty of the heresy of thinking the decision not the best possible, yet we know how to act and how we must act to avoid the penalties of the 17th Section of the Merchant Shipping Act, 1873, and the seaman may console himself with the reflection that the decision is for everyone, and not merely for such exceptionally good seamen as he, from the fact of

his knowing better than the Judges, must assuredly be. Mr. Marsden has not confined his researches to English Law, but we find all important American cases cited, sometimes with an almost American sense of humour. Such is the account of the *Corsica* (9 Wall, 630), at p. 419, which certainly shews the possible danger of maritime civility in a very forcible light. That case led us to look for the most celebrated case of the sort, when H.M.S. *Bellerophon* obtained a newspaper at sea at a cost of £80,000 to the unfortunate owners or underwriters of the vessel giving it, and we were somewhat disappointed at finding only the conclusions of law, which indeed, perhaps, our disappointment makes us a little too critical of, for the doctrine as laid down at p. 454 would lead many people to suppose that H.M.S. *Bellerophon* was held to blame for not giving notice to the *Flamstead* that she had a ram under water which would probably sink any vessel which chose to impale herself upon it. Reference to the case in 3 Asp. M.L.C. 58, however, shews that she was blameless, notice of such a concealed danger only requiring to be given to a reasonable person who, when acting reasonably, may meet with danger; not to a man who is in the middle of the ocean in broad daylight and allows his over-strained courtesy to bring him into collision with the ram.

Mr. Marsden gives, at p. 161, an interesting summary of the diverse Laws of different civilised States on the subject of the incidence of damage when both vessels are to blame for a collision, but the references to the Belgian, Spanish, Italian, and Portuguese Codes are now out of date, the last three having been reformed since the date of this edition, the first previously, in 1880, and from the considerable changes introduced this note requires to be rewritten, for which purpose possibly both the translations of Foreign Maritime Codes appearing from time to time in this *Review*, and also the able and instructive pamphlet on

Collisions at Sea (*L'Urto di Navi in Mare*), just published by Dr. G. C. Buzzati, Professor of International Law in the University of Padua, may afford useful material. The other two books on our list are both new editions of well-known works by Mr. Richard Lowndes. As to the second edition of the *Law of Marine Insurance*, we cannot do better than paraphrase the opening sentence of the Préface, and say, "This Edition hardly requires" criticism, and indeed the preface itself supplies all that is wanted. The Chapter on Subrogation, which is added, is a valuable addition to the book, on a subject with which Mr. Lowndes is specially qualified to deal, and we may add that, in our opinion, he has succeeded in carrying out his intention to make the work "as short and as plain" as possible, so that it may "be useful to mercantile men" as well as "students." The fourth Edition of Mr. Lowndes's larger work on *General Average* is of more recent date, its publication having been delayed, as he tells us, to await the final decision of the two important recent cases of *Atwood* v. *Sellar* and *Svendsen* v. *Wallace*. That the author regrets the ultimate decision of the latter case is natural, having regard to its anterior circumstances, but none the less he loyally accepts it as a settlement of this very difficult question, though possibly he is not altogether sorry to point out, that which no one is better able to do than himself, "the practical difficulties "which must follow the attempt, which is nevertheless "obligatory, to carry out the principle of the judgment in "mixed cases, *e.g.*, when the ship puts into port to repair "both kinds of damages combined" (Preface, p. vi.). The attempt is made mainly in §§ 50—55 (pp. 219—234), and an attentive perusal of these sections is absolutely necessary to comprehend the far-reaching result of the Judgment in the two cases above mentioned.

It is perhaps to be regretted that in the discussion of Complex salvage operations in Chapter IV., no reference

is made to the case of the *Royal Mail Steamship Tagus*, which is a neat sequel to the English cases cited in that chapter, and marks the line of cleavage between the American and English authorities on the subject; probably, however, though the case was decided, there was no regular report of it when the book was completed. Mr. Lowndes, in common probably with all persons who have occasion to consider the Law Maritime, pines for a real Common Law of the Sea on the complex question of General Average, and seems to favour the Continental plan of enacting uniform Codes on the subject, on the basis of the York and Antwerp rules, speaking with the highest approval of such recent Codes, notably those of Germany, Belgium, and Italy, as tend in that direction, and of the prospective Scandinavian Code, which, if carried out, will go further, as by it an absolutely identical Code is proposed for Denmark, Sweden, and Norway. On the other hand, he condemns the new Spanish Code, which practically perpetuates the rules of the old French Code, notwithstanding that the Courts of the latter country have adopted artificial interpretations of them which remind one more of the readings of the formularies of the Church of England in an ecclesiastical case than anything else. It may, however, be a question whether the best way to arrive at uniformity of practice is not to follow the English plan, and allow everyone to contract as they will without being fettered by Code-law at all. Already the York and Antwerp rules are incorporated in a large number of Bills of Lading, and probably the number will continually increase, whilst if, as time goes on, alterations in these rules are found to be desirable, they can be made by the merchants and shipowners themselves, without requiring each maritime nation constantly to reform its Code. As an indication of the importance, so frequently pointed out in our pages, of a knowledge of Foreign Maritime law, as it at present stands, whether to the student of Jurisprudence,

the practising lawyer, or the practical Average Adjuster, we have over 300 pages of appendices in Mr. Lowndes's book devoted to careful translations of the Maritime Law of almost every considerable State, on the subject of General Average, whilst we have already pointed out in our reference to Mr. Marsden's work that he and Professor Buzzati have found it requisite to do the same for the sections of those laws relating to Collisions.

In conclusion, we will only say that Mr. Lowndes's work on *General Average* is almost a model for a practical law book, leaving nothing to be desired either in type, perspicuity, or precision of statement, and were it not that everyone knows without the announcement on the title page, the profession of the author, it would require his modest assurance of the fact to convince the lawyer that he had "not had the advantage of a regular legal Education." Writing, as we do, just when the news of the almost despaired of safety of the *Danmark's* passengers has arrived, and of the "extraordinary" sacrifice by jettison made for their safety by the captain of the British steamship *Missouri*, we may not be deemed to go beyond our province if we express the hope that he and his owners may yet find that the loss of the cargo thrown overboard does not ultimately fall upon them, but that in the improbable event of the owners of the *Danmark* being unwilling, or the more probable one by their being unfortunately unable, to make good that loss, it should be made good in the interests of our common humanity by what may be likened to a General Average contribution of all those who have an interest in the noble deeds of British seamen. In this case there appears to be no *res* saved, and therefore no legal claim for salvage against the *Danmark*, and if the jettison was made in the interest of others, and not for the benefit of the *Missouri*, her cargo and freight, it cannot be brought within any recognised principle of the law of General Average.

IV.—FOREIGN MARITIME LAWS: III. SPAIN.

THE New Code of Commerce for Spain, of which the Maritime Law forms Book III., came into operation by Royal Decree of the late King Alfonso XII., on 1st January, 1886. It is intended to supply defects found to exist in the old Code, which dated from 1st January, 1830, but claimed to be founded, so far as its Maritime part was concerned, on the most ancient of European Sea Laws, the *Consulado del Mar*, which is asserted by its warmest admirers to be nearly coeval with the Conquest of England by William I., and to have been the parent of all the Maritime Codes of the Middle Ages. There is, indeed, considerable doubt whether it originated in Barcelona, as the Spaniards contend, or in the Maritime States of Italy. It cannot be doubted, however, that the Code of Spanish Laws known as the "Siete Partidas" was in force in Spain in the middle of the 13th century, and that the fifth Part of it, containing the Maritime Laws, bears so strong a family likeness to the Rules of Oléron, the basis of English Maritime Law, that if not derived from it, both have probably a common parent in the *Consulado*. Perhaps the most notable points about the present Code are the following:—It clears up the doubt existing, in England at all events, under the former Code, as to whether an owner is liable, up to value of his ship, for damage done by the ship when he is not on board (see *The M. Moxham*, P.D. 43, 107), or whether such damage, being an "excesso" or beyond the duty of the captain, fell upon the actual wrong-doer. It is now clear from Tit. IV., § 3, and especially Arts. 826, 837 of that section, that the ship-owner is liable. The whole chapter on Collisions is new,

and contains a special provision for the case of "both to blame," Art. 827, and also for that of "inscrutable fault," Art. 826, viz., that in both cases each ship bears its own loss, but both are liable for damage sustained by their cargoes, which is in accord with the Common Law of England, as distinguished from the Admiralty Law, prior to the Judicature Act, except that in the case of inscrutable fault, the cargo would only have recovered from the ship carrying it for breach of contract, not from the other for a tort which, *ex concesso*, could not be proved. On the question of Insurance, the Code, unmoved by the York and Antwerp rules, and International Conferences, adheres closely to its former provisions, but, nevertheless, allows considerable liberty of contract, in this and other matters; thereby perhaps inclining to the English principle that justice is more likely to be attained by allowing persons *sui juris* to contract as they like, and leaving the Courts to determine what they mean in case of a dispute, rather than by the Continental plan of prescribing *à priori* what contract is entered into.

CODE OF COMMERCE OF THE KINGDOM OF SPAIN.

BOOK III.

Of Maritime Commerce.

TITLE I.

Ships.

ART. 573. Merchant vessels are property which can be acquired and transferred by any of the methods recognised by law. The acquisition of a ship must be stated in a document in writing, and has no effect as regards third parties unless it is entered in the Mercantile Register.*

* This Register is regulated by Art. 4 of the Decree sanctioning the new Code, Book I., Tit. II., of the Code, and the Provisional Decree of 21st December, 1885. The important sections of these various ordinances will be found in the Appendix; it is sufficient to say here that the Register

Moreover the property in a ship is acquired by *bonâ fide* possession for three years with a proper title duly registered.

Failing any of the requirements above-named, an undisturbed possession for ten years is necessary for the acquisition of the property.

A captain cannot acquire by prescription the property in a ship which he commands.

Cf. 583-587 of the former Code, B., Bk. II., 1, 2; F. 190, 195, 430; G. 439, 440, H. 309; I. 483, 917, 918, N. 1-3, R. 801-817.

574. Shipbuilders may, in building and fitting ships, use the materials and follow the plans which best suit their interests.

Shipowners and seamen are subject to whatever laws and regulations the Public Administration may lay down as to navigation, customs, health and safety of ships, and other matters of a similar nature.

Cf. 588 of former Code.
I. Mer. Mar. Code, Tit. II., Chaps. I. and II., R. 784-787.

575. Part owners of a ship enjoy the right to pre-empt and withdraw from a sale made to strangers, but they can only avail themselves of it within the nine days following the entry of the sale in the Register, and on a deposit of the price mentioned in the Bill of Sale.

G. 470 diff., H. 324 diff., I. 495 diff., N. 7, R. 825, 826, Sw. 9, 10.

576. The sale of a ship is always considered to include such of her apparel, furniture and tackle, and machinery, if a steam-vessel, as are at the time under the control of the vendor.

The sale is not considered to include arms, ammunition, provisions or fuel.

consists of (1) a List of all persons engaged in trade; (2) of all companies or associations so engaged; and (3) in Ports, of all ships and vessels belonging to the port, including under this denomination, all hulks, pontoons, floating piers, lighters, &c., used for trading purposes.

The vendor is bound to deliver to the purchaser the certificate of the page of the entry of the ship in the Register down to the date of the sale.

Cf. 594 of former Code.

G. 443, H. 309, I. 480 diff., R. 827.

577. If the transfer of a ship takes place whilst she is on a voyage, the gross freights then being carried, and which are due since the last loading of the ship, belong to the purchaser, and the payment of the crew and other persons composing the ship's company for the same voyage are payable by him.

If the sale takes place after the arrival of the vessel at her destination, the freights belong to the vendor, who is liable for the payment of the crew and other persons composing the ship's company, unless in either case it has been otherwise agreed.

Cf. former Code, 594.

G. 441, H. 325, I. 489, Sw. 5.

578. If the owner or owners of a ship voluntarily sell it whilst on a voyage, or at a foreign port, whether to Spaniards or to foreigners domiciled in the capital or port of another nation, the Bill of Sale must be agreed to before the Spanish Consul of the port where the voyage terminates, and the above-named Bill of Sale will be of no effect as regards a third party unless it is entered in the Consular Register. The Consul will at once send an office copy of the Bill of purchase and sale to the Mercantile Register (*a*) of the port in which the vessel is entered and to which she belongs.

(*a*) See Book I., Tit. II., Art. 26 in App.

In all cases, the transfer of a ship must state expressly whether the vendor receives the purchase-money in full or in part, and if for a part or the whole he retains any charge on the said ship, where the sale is to a Spanish subject, the fact will be stated in the ship's register.

When a ship becomes unseaworthy in the course of a voyage, the Captain must have recourse to the judge of the

proper Tribunal at the port he reaches, if in Spanish territory, and to the Spanish Consul if there is one, or if there is none to the Judge or Court or Local Authority if abroad, and the Consul, Judge, Court, or, failing them, the Local Authority will order a survey of the ship. If the consignee or insurer reside or have representatives at the place, they must be summoned to intervene in the proceedings so far as they are concerned.

H. 310 Diff., N. 4, R. 801-17, Sw. 36, E. 3. 52.

579. When the damaged condition of the ship and the impossibility of repairing it so as to continue the voyage are proved, its sale by public auction will be ordered, subject to the following rules:—

(1.) The hull, rigging, engines, stores, and such like articles are appraised, an inventory being drawn up, and facilities are given to those concerned in the sale to obtain information of these proceedings.

(2.) The Warrant or decree ordering the sale is posted up in the customary places (for public notices), an advertisement is inserted in the newspapers of the port, which give notice of the process, if there are any, and in such other papers as the Tribunal may determine.

The time fixed for the sale cannot be less than twenty days distant.

(3.) These advertisements will be repeated at intervals of ten days, and the fact of the publication will be stated in the proceedings.

(4.) The sale will take place on the day fixed, with the forms prescribed by ordinary law for Judicial sales.

(5.) If the sale takes place abroad, the special rules prescribed for such cases must be observed.

P. 237, G. 444, 473, H. 311, 376, I. 513, Sw. 47.

580. In every Judicial sale of a ship for benefit of

creditors, the debts will be marshalled in the following order:—

(1.) Debts due to the Public Exchequer, which are proved by means of an official certificate from the proper authority.

(2.) The Court fees for the proceedings, according to the scale approved by the Judge or Court.

(3.) Pilotage and tonnage dues, as well as sea and port dues, proved by proper certificates from the Heads of Departments authorised to collect them.

(4.) The wages of warehousemen and watchmen for the ship, and all other expenses incurred in its preservation, from its arrival in port down to the sale, the payment or debt in respect of which is justified and approved of by the Judge or Court.

(5.) The hire of warehouses where rigging and stores of the ship are preserved, according to agreement.

(6.) The wages due to the Captain and crew for the last voyage, which are proved by means of a portage bill drawn up from inspection of the muster rolls and account books of the ship, passed by the head official of the Mercantile Marine, where there is one, and failing him by the Consul, Judge, or Court.

(7.) The repayment of (the value of) any portion of the cargo which the captain has sold to repair the ship, provided always that the sale is shewn to have been ordered by Judicial warrant, carried out with the forms required in such cases, and noted on the ship's register.

(8.) The portion of purchase-money unpaid to the last vendor, debts owing for materials and work and labour in the building of the ship, if she has not been to sea, and those for repairing and fitting out the ship and supplying provisions and fuel for the last voyage.

The debts enumerated under this head, must, in order to take advantage of this preference, be proved by a contract entered in the Mercantile Register, or if they are contracted for whilst the ship was on a voyage and had not returned to her home port, they must shew the authorisation required in such cases, and be noted in the ship's register.

(9.) Moneys borrowed on Bottomry on the hull, bottom apparel, and furniture of the ship before commencing the voyage, proved by contract entered upon legally and noted in the Mercantile Register; moneys borrowed in the course of the voyage, under the authority mentioned in the former number, if they comply with the same conditions, and the premium of insurance, proved by the policy of insurance or by a certificated extract from the Broker's books.

(10.) Indemnity due to the shippers for the value of goods shipped and not delivered to the consignees, or for damages sustained by them for which the ship is liable, provided always that either the one or the other is proved by a Judicial Decree or decision of an Arbitrator.

B. Bk. II., 4, 5, F. 191, 192, G. 757, 772, H. 313, 315, 317, I. 666, 674, 677, N. 101, Sw. 275—277, E 5.

It should be observed that this Code has not followed the new Belgian Code in giving a lien or privilege for damage done to another ship by collision.

581. If the proceeds of the sale are insufficient to pay all creditors included in the same class, such proceeds will be divided amongst them *pro ratâ*.

B. Bk. II., 4, F. 191, G. 773, H. 314, I. 668, 669, E. 5.

582. All liabilities of a ship to (previous) creditors are deemed to be extinguished by a document shewing a Judicial sale by public auction, assented to, and inscribed in the Mercantile Register. But if the sale be a voluntary one, and takes place whilst the ship is on a voyage, the creditors preserve their rights against the ship until her

return to her home port, and for three months subsequent to the entry of the sale in the Register, or the return of the ship.

B. Bk. II., 6, F. 193, 196, G. 767, 768, H. 316 diff., I. 678, Sw. 278, 284, E. 7, 9.

In the former Spanish Code, by Art. 601, creditors retained their rights for six months after the return of the ship.

583. If it happens in the course of the voyage that the captain is obliged to contract one or other of the obligations mentioned in clauses 8 and 9 of Art. 580, he will have recourse to the Judge or Court, if he is in Spanish territory, and if not, to the Spanish Consul, if there is one, and failing him, to the Judge, or Court, or proper Local Authority, and produce to him his certificate of the page of the inscription with which Art. 612 deals and the documents which prove the contract debt.

The Judge or Tribunal, the Consul or Local Authority, as the case may be, on inspection of the documents, will make a provisional note of its decision on the certificate, that (the debt) may be formally entered in the Register when the ship reaches her home port, or may be admitted as a legal and privileged debt in case of a sale before the ship's return, if the ship is sold in consequence of being condemned as unseaworthy.

The omission of this formality will render the Captain personally liable to the creditors who have been prejudiced.

B. Bk. II., 24, 26, F. 234, 236, G. 686, H. 372, I. 509, 391, N. 95, R. 912, 1060, 1062, Sw. 42, E. 49.

584. Ships which are affected by a liability for the debts mentioned in Art. 580 can be arrested and sold judicially, in the way prescribed by Art. 579, in the port in which they are found, at the instance of any one of the creditors. But if they are laden and fitted out for sea, an arrest cannot be justified except for debts contracted for the fitting out and provisioning the ships for the same voyage, and, even in that case, the arrest will be raised if any one concerned in

the adventure gives security for the return of the ship within the period fixed by the bond, obliging himself if she does not return, even in consequence of an accident, to pay the debt so far as it is legal.

A ship can only be seized in its home port for debts of any description whatsoever other than those included in Art. 580.

F. 197, 215, G. 446, H. 311, I. 672, 879, 881, N. 107 diff., E. 10, 29.
Cf, former Code, 602-604.

585. In all legal respects other than those which are modified or restricted by the law laid down by this Code, ships are treated as chattels.

B. Bk. II., 1, F. 190, H. 309, I. 480, E. 4.

F. W. RAIKES.

V.—SIR TRAVERS TWISS ON THE LAW OF NATIONS IN TIME OF WAR.

LITTLE more than two years have passed since we drew the attention of our readers to the first volume of the French Edition of the Standard Treatise of Sir Travers Twiss. We have now the pleasure of welcoming the second volume, which deals with the important questions connected with War.* That war is an evil, and a very great evil, too,—most Jurists, and in particular writers on the Law of Nations, have long been agreed in proclaiming. And that a state of things in which there should be no more war would be a very pleasant and much to be desired state of things, such writers have also freely recognised. Consequently, there have arisen, more parti-

* *Le Droit des Gens. II. Droits et devoirs des Nations en Temps de Guerre.* Par Sir TRAVERS TWISS, Docteur en Droit, &c. Nouvelle Edition Revue et Augmentée. Paris. G. Pedone Lauriel, Succ. 1889.

cularly in these latter days, men, nay more, bodies of men, who have lifted up their voice against war, and have endeavoured to substitute International Arbitration for the rude arbitrament of the Sword. To one such man, an unwearied Apostle of Arbitration, Pasquale Stanislao Mancini, Italy has decreed the honour of a bust, to be placed in the Chamber which he so long influenced by his eloquence and his devotion to the service of Humanity as well as of his Fatherland. To another such, a member of our own House of Commons, the late Henry Richard, M.P., Sir Travers Twiss pays a just tribute in the Introduction to his Second Edition, printed in the present translation of his work, in relation to the part which Mr. Richard took in the Conference of the Association for the Reform and Codification of the Law of Nations at The Hague in 1875.

The Conference before which the late Henry Richard raised the point that there existed much uncertainty as to what is the Law of Nations on certain important points, and that therefore the present state of that Law was unsatisfactory, is itself a living witness to the progress of Thought in the Juridical World on the subject of the Law of Nations.

Founded in 1873, at Brussels, a few weeks only after its elder sister, the Institute of International Law, had been established at Ghent, the Association has always kept the question of Arbitration before it as one of those points of capital importance which must demand attention in any serious attempt at the Reform and Codification of the Law of Nations. And this rightly, for without going the length of supposing International Arbitration to be a panacea for all the ills that flesh is heir to, we may yet concede that its general employment, at least as a last endeavour to arrive at a peaceful solution of differences between the Nations, would greatly lessen the danger of war throughout that part of the world which calls itself civilised. More than this, we

suppose, neither Mancini nor Henry Richard expected from Arbitration. Less we could not well expect from it, if sought and carried out in good faith on both sides. For the extent to which the principle they so earnestly maintained has already been acted upon among the Nations, our thanks are certainly due to the two distinguished men who laboured so steadfastly in the Cause of Peace in the Parliaments of their respective countries.

The subject of International Arbitration has been chosen for one of the Congresses, amounting we believe to sixty-nine, to be held in Paris during the International Exhibition and Centenary Festival of the French Revolution of 1789. It is perhaps a tribute to the progress of sentiments favourable to Peace that such a Congress should be held as part of the Commemoration of a Revolution which was directly and indirectly the cause of such rivers of blood being poured forth from one end of Europe to the other. We do not suppose that the labours of the Congress will do much towards establishing Arbitration as the rule, and War as the exception, for the Programme of its proposed debates did not appear to us to shew much of a practical spirit, but to be somewhat too largely marked by a certain vagueness which is too frequently noticeable in the utterances of the partisans of Arbitration. The suggestion, for instance, that the Congress should set to work to prepare a Code of International Law seems entirely to ignore the object to the attainment of which the Institute of International Law and the Association for the Reform and Codification of the Law of Nations have so long been devoting so much of their energies, and it seems likewise entirely to ignore the *Draft Outlines of a Code of International Law* (New York & Lond. 2nd Ed. 1876), prepared and presented to the world by Hon. David Dudley Field. These various helps to reaching the common goal should not have been summarily set on one side,

That Arbitration, if generally adopted, would actually prove a panacea for all the ills that States are heirs to, and for the healing of which they have recourse to War, is more than we are prepared to admit. As yet, at any rate, no suitable Tribunal of Arbitration has been found to which it could fairly be hoped that all the Nations would resort, and to whose judgment it could fairly be expected that they would readily bow. The momentary gleam of its Mediæval aspect of Arbiter among the Nations which the Caroline Islands Arbitration shed upon the Papacy may, for a short time, have led others besides the present wearer of the *Triregno* to think that the Chair of Peter might once more be the Fountain of Justice for all people that on earth do dwell. But the idea could only be a passing fancy, born of a temperament alien to that of the Nineteenth Century. Leo was pleased,—and it happened to suit Bismarck to please him. But Bismarck must have known quite well that the conditions which made the Papacy a valuable Arbiter in the Middle Ages are wanting now, and cannot be restored. It may be questioned whether the act of referring the matter in dispute to the Pope's arbitration was not part of the attempt which is obviously made to identify the modern German Empire, the creation of the sword in the Palace of Versailles during one of the most sanguinary of recent wars, with the historic Holy Roman Empire of the Middle Ages, which in theory at least had for its counterpart, or other self, the Holy Roman Church, the two constituting together the two Lights of the Mediæval Firmament, though as to which was the greater and which the lesser Light, opinions might and did widely differ.

On the only too probable hypothesis that War will still, for perhaps long years to come, be the *ultima ratio* of disputes among States, it becomes worth while to enter into the details which so largely occupy Sir Travers Twiss in his present volume, and consider what is War, and what

are its effects, its limitations, its purposes. Does it place all the Citizens of the two Belligerents in a state of hostility to each other? That was the old doctrine, and it stil finds a place in the pages of Sir Travers, although with qualifications, like the Toast drunk to Archbishop Sharp by John Balfour of Burley. The modern tendency is to regard War as a duel between the two States at issue, and not to extend the hostile character beyond the actual combatants on the two sides. But this tendency is itself still somewhat in the Theoretical stage. It does not square well with the case of Bazeilles in the Franco-German War: but then Theory does not always square well with Practice, even in the Law of Nations.

Portalis and Talleyrand both laid down that War is waged between States, and that private persons in the two contending States are only enemies "by accident." Mr. Field adopts this view, and has embodied it in his *Code*, Art. 705, where he says, "War is a relation of Nation to Nation, or of Community to Community, and does not affect the relations of individuals with each other, except within the limits allowed by this Book [*i.e.*, Bk. II. of the *Code*]." This Article is proposed by Mr. Field as embodying "the general principle contended for by the best modern authorities, and its recognition has been the source of the greatest ameliorations yet introduced into the laws of War."* And he says of the "legally imputed hostility," which formerly prevailed between the whole populations on the two sides, that it is "now so far mitigated by treaty provisions, and by ameliorations in the usages of War, and is so much opposed to the tendency of modern opinion, that it seems proper to recognize a different rule." He

* For an earnest plea in favour of what the author of the *International Code* considers much needed Ameliorations in this important Branch of the Law of Nations, see *Law Magazine and Review*, No. CCLXVII., for February, 1888, Art. *Amelioration in the Laws of War.* By Hon, David Dudley Field, LL.D,

accordingly proposes the rule above cited as one which "more truly represents the better opinion of civilized nations, and more nearly conforms to the practice of hostilities at the present day." As far as Theory goes, we believe this to be true, but we are not so sure when we come to consider Practice. No doubt we should not, in the case, *e.g.*, of a war with France, resort to the utterly arbitrary measure of imprisoning all the subjects of the Enemy State found within our gates at the time of the Declaration of War, which Napoleon adopted on the rupture of the Peace of Amiens. But even he professedly founded his treatment of the British subjects in France at the time on the theory that they belonged to the Militia of their native land, although it must be obvious that this plea, even if true of the men among them to a far larger extent than it probably was, could not have been true of the women and children who in many cases accompanied them.

That Sir Travers should condemn the First Consul's act as entirely contrary to the modern practice of the Law of Nations was to be expected, for, as he cites from Halleck, it is clear that even the *Lex Talionis* would scarcely have sufficed to justify it. But we may hope that the interest of the question is purely Academic; though we cannot at any moment feel sure as to the possible line of such Despotic Governments as Russia or Turkey, if pique, or supposed interest were to seem to suggest the following of the evil precedent of 1803.

With regard to the actual Declaration of War, known in the olden language of Diplomacy as *Diffidatio*, we are inclined to think that something of the original nature of this Declaration might have been drawn out by Sir Travers from the sense which the same term bore in the Feudal Law, where it signified that renunciation of homage to the Superior which set the vassal free to make war upon him. That a word bearing this apparently restrictive meaning

should come to be applied generally to a Declaration of hostilities, is not surprising if we consider the extremely complicated web of Feudal relations between the various Kings and Princes of Western Europe during the Middle Ages. So numerous were the points at which one ruler touched another in the way of either owing homage to him or receiving homage from him for some lands (in theory at least, if not always in practice), that it can scarcely have been legally possible for any Mediæval Sovereign to declare war against a Potentate to whom he did not stand in some Feudal relation which he must renounce before going to war with him. *Diffidatio*, the untying of this Feudal knot, was therefore, it appears to us, a practical as well as a very proper legal measure to take in the Middle Ages before opening a campaign. It may sometimes have been little more than a solemn farce, something like the modern waiving of a certain ghostly but perpetually recurring and evidently annoying section of the Companies Act, 1867, in case certain contracts entered into by the Company which wishes to allure us into subscribing should be held to be contracts within that section. We do not repeal: we go on waiving.

Amongst the various incidents of Maritime warfare, giving rise by the cases which the Courts have had before them to new applications of the doctrines of Maritime Law, a much contested doctrine of recent growth, that of "continuous voyages" receives due attention at the hands of Sir Travers Twiss, whose name is, indeed, well known in connection with it from the opinion given by him, in conjunction with a number of his distinguished colleagues of the Institute of International Law, in regard to the case of the *Springbok*, with which the alleged doctrine is so closely bound up. The case is, as far as we can see, remarkable not only for the difference between the several Judgments, in First Instance, in the United States District Court for

New York, and on Appeal, in the Supreme Court of the United States, but also for the curious mode in which the Supreme Court, after reversing the Court below on the point of the alleged false Papers of the *Springbok*, which on the Appeal were declared to be all authentic, and none false or simulated, yet turned round, in what can only be called an unwarranted manner. For it asserted, in the teeth of the previously admitted regularity of the ship's Papers, that there could be no doubt that the original intention of the owners of the cargo was to violate the Blockade of the Atlantic Ports of the Southern States, and to transship at Nassau on board some [purely hypothetical] vessel better suited than the *Springbok* to reach a blockaded port, and that the voyage from London to a blockaded port [which was not and could not be on the record] constituted both in Law and in the mind of the owners of the cargo one continuous voyage.

So much has been said already of this famous Judgment that we may be excused from saying much here. What strikes us in the case is principally this, that the doctrine embodied in the Judgment might be a very good hypothesis, but certainly could not be, on the facts before the Court, a good exposition of the Law Maritime in the matter of Prizes.

But what was before the Court was a simple question of fact, or rather a series of related questions of fact. Were the Papers carried by the *Springbok* regular or irregular, true or false? What was the ship's destination? Was it to a blockaded or to a Neutral port? By declaring the *Springbok's* Papers authentic, the Supreme Court, in point of fact, decided the legitimacy of the *Springbok's* voyage, and consequently that its cargo was not lawful Prize. Otherwise, there will clearly be no use in being a Neutral, as regards commercial privileges in time of war, and everybody may just as well fight everybody else all round, when

the United States may happen to be parties in a future war, since no Neutral commerce could possibly be safe, on the Judgment of the Supreme Court, U.S.A., in the *Springbok*.

This is really not overstating the result of that Judgment, fanciful as the position thus stated for Neutrals may seem to those who have been educated in older and more sober views of the legal aspects of shipping adventures in time of War. The adventure in the case before us was *primâ facie* perfectly lawful. The ports of expedition and destination, London and Nassau, were alike Neutral, both being indeed under the same National flag, which was also that of the ship claimed as good prize. There was, therefore, *ex hypothesi*, nothing more suspicious about the voyage than about one from London to Plymouth or Dublin. And as far as the judgment of the Supreme Court, U.S.A., goes to prove anything, it goes a long way to prove that a passenger and goods steamer, plying in the ordinary course of weekly traffic between London and Dublin, might, just as well as the *Springbok*, have been captured outside the Territorial waters of the United Kingdom by a cruiser of the United States Navy, and taken into New York as good Prize. But of such an argument it may be said that it is a *reductio ad absurdum* of the *Springbok* judgment. If so, the fault, we submit, is not ours, but that *pro tanto*, of the Supreme Court, U.S.A., for having rendered a Judgment capable of such treatment. It seems obvious that a Judgment capable of being so reduced *ad absurdum*, and denounced as bad in International Law by so great a weight of authority of various Nationalities as was represented on the Committee of the Institute of International Law, whose opinion is printed in the volume before us, (pp. 219-20), should in such formal manner as may be found most compatible with the dignity alike of the Government of the United States, and of its Supreme Court, be explicitly disavowed by the Government. As

long as the Judgment of the Supreme Court retains its present position, it is not too much to say, in the words of Sir Travers Twiss (*op. cit.*, p. 218) that it has added to war a new terror for Neutral Commerce, and introduced a new *ratio decidendi* into the Procedure in the matter of Prizes. This is a very serious matter, and it is therefore one on which we have thought it right to dwell at some length. There is no use in saying that at present we are at peace, and there is no prospect of any war in which the United States should be engaged and in which we should be Neutral. It is really impossible to say, from one moment to another, unfortunately, what nations may or may not be at war, and though it may be hoped that we should be Neutral in any conflict in which the United States might be engaged, that circumstance would yet only afford a limited satisfaction to us if the doctrine laid down in the *Springbok* were maintained by the American Government of the day. It is quite certain that British shipowners would not at all enjoy finding their adventures condemned like that of the *Springbok*. And it is not at all improbable that they might represent to their own Government that they might just as well take the chances of war as Belligerents themselves as the chances of Neutrality on the basis of the alleged doctrine of Continuous Voyages. In the interests of Neutral Commerce, we can only hope that this too famous doctrine may yet be formally disavowed.

With regard to another recent and much disputed question, the Rice question during the Franco-Chinese hostilities, which were supposed by France to be Reprisals, and not a state of war, it is somewhat curious to look back at the text printed by Sir Travers Twiss (*op. cit.*, pp. 255-6), of the Treaty of St. Germains, 1677, between France and Great Britain, in Art. 4 of which it is laid down that "blez, orges, et autres grains et légumes, ... sels, et tout ce qui appartient à la nourriture et sustentation

de la vie," shall *not* be considered by the High Contracting parties to be Contraband of War. It would seem, therefore, that within the last two centuries there has been a decided and much to be lamented retrograde movement in the French view of Contraband, while Great Britain, and, it is believed, the other Western Powers generally, may clearly be credited with maintaining the established principles of two centuries ago. This is a singular state of things, and, unfortunately, it is only one of several points on which the attitude of France has of late years been retrograde in its interpretation of the Law of Nations. That such should be the case is unquestionably matter for regret. Whether we consider her neighbourhood to ourselves, the many widely scattered points of the world's surface at which our interests touch, or the high distinction to which French writers on International Law have attained, we must equally regret that the name of France should, by the action of so many of her official representatives in different parts of the world, have become identified with a policy of retrogression which it is extremely difficult to reconcile with the claim so constantly made on her behalf for a high position in the Vanguard of Civilised States. Neither French Admirals nor French Residents seem likely to support this claim. Rather, we fear, will they, if they should continue on the lines so fatally laid down in Madagascar and the China Seas, in Tonquin and Tunis, go far towards raising unnecessary difficulties for the already heavily weighted rulers of the French Republic.

The Appendices to the French version bring the valuable Treatise of Sir Travers Twiss very closely down to date, embracing as they do the International Convention of 29th October, 1888, for the Neutralisation of the Suez Canal (a subject on which we have been indebted to Sir Travers for a valued contribution, *On International Con-*

ventions for the Neutralisation of Territory and their application to the Suez Canal, in the *Law Magazine and Review*, No. CCLXVI., for Nov., 1887). They also embrace, of course, the several Conventions of Geneva, St. Petersburg, and London, having for their object the mitigation of the rigour of the Laws of War.

The movements connoted by these various Conventions are in themselves eminently humane and laudable. The question how far the several Conventions will really have a humanising effect in war is one which cannot yet be considered by any means near solution. The possibilities of war, through misunderstandings between States, have been greatly increased of late years by the expansion of the direct or indirect areas of influence of the principal European Powers in Africa and the Far East. The "Scramble for Africa" is, indeed, a sort of by-word at the present day. Tunis, Tripoli, Morocco, Egypt in the North, the German East African Company's possessions in former Zanzibar territory, the strenuous assertion of Portuguese claims from ocean to ocean, and on the borderland between British interests and those of the Independent State of the Congo—these, to take Africa alone, of the various possible powder-barrels which may at almost any moment explode to the destruction of the peace of Europe, cannot but cause serious reflection to the Diplomatist and the Jurist. We shall rejoice if, as the enlightened Sovereign of the Congo State undoubtedly hopes, that State should become a Light of the Dark Continent, whereunto the lovers of Peace may turn, and in whose Light they may rejoice. We shall be equally glad if the prudence of Governors, Residents, and Admirals of the various Nations of Western Europe employed in African and Pacific Stations shall be found equal to the great trusts confided to them. For these trusts, they should remember, are in fact confided to them not solely on behalf of their own Home Governments,

but also on behalf of that Civilisation which those Governments claim to represent. They are, in truth, whatever their nationality, Pro-Consuls of an Empire on which the sun can never set, the Empire of Law. Whether in Peace or in War, there is still an Empire of Law. Whether in Peace or in War, there is still an Empire of Truth and of Right. Of such an Empire a Gentili and a Grotius, and many another in the days of old were the powerful advocates. Of such an Empire, Societies like the Institute of International Law and the Association for the Reform and Codification of the Law of Nations, and text-writers such as Sir Travers Twiss, are the powerful advocates at the present day. In taking leave of the second volume of his *Droit des Gens*, we must express once more our thanks to the learned author, and remembering the light which such works shed abroad over the earth, we would recall alike to Sir Travers and to our readers the famous saying of old, *Lux Gentium Lex.*

VI.—FEDERAL CONSTITUTIONS IN U.S.A. AND BRITISH COLONIES.

I.—U.S.A. AND CANADA. II.*

WE are not proposing at the present moment to enter into the discussion, tempting as it would be, of the vast field of problems opened up by Prof. Bryce in his recent and most interesting contribution to the study of Federal Government. That may be reserved, time and space permitting, for a future occasion. What, however, we would fain do just now is to call attention to certain points regarding Canada which have been raised of late, involving the question on whose side is the best Federal Constitution,

* [See *Law Magazine and Review*, No. CCLXIII., for Feb., 1887.—Ed.]

on the side of the United States, or on the side of Canada? This question has been, and perhaps may still for some time continue to be, argued Academically in the pages of American Magazines. For the present we may content ourselves with drawing attention to certain remarks in the way alike of criticism and of defence which have appeared from the pens of distinguished British and American writers in the *Forum* (New York. *Forum* Pub. Co.), and with pointing out some instructive features in the early Constitutional history of New England. The near neighbourhood of the Dominion of Canada and the United States in itself forces a comparison of their Institutions, and since the Federation under the B.N.A. Act, 1869, that comparison has grown in frequency and in interest. Both countries now possess what must be called a Federal Constitution though there are necessarily some salient points of difference between them. This difference, as American writers are not slow to point out, meets us at the very threshold of our enquiry, for the result of the Canadian Federation is called a "Dominion," while the result of the American Federation is called the "United States." There you have it in a nutshell, says our American friend. The members of the Canadian Federation are Provinces, and are nothing more than what that word imports, and that is, subjection to an Imperial Government, of which the said Provinces, though federated into a Dominion, are themselves portions, endowed by the Parent State with a certain amount of Local Autonomy. Therefore, *ex hypothesi*, the Dominion of Canada is not itself a State, nor are its units, the several Provinces, in themselves States. And as the Provinces do not possess the attributes of Sovereignty, they cannot delegate any to the Dominion. Whether this is a true Federal Union may be open to question. Whether the word "Dominion" was the best word which could have been chosen to express such a form of inchoate Federal

Union, so to speak, as has been created in Canada, may also be open to question.

The Union which was constituted by the Thirteen Colonies which had formed part of His Majesty's Plantations in America was a true Federal Union, inasmuch as it was a Federation of Sovereign States. From the moment that the several Colonies had established their Independence, they were each in full possession of the full Sovereignty which had theretofore been shared between them and the mother Country. They had, in point of fact, exercised many, if not most, of the attributes of Sovereignty long before they actually threw off British allegiance, *eo nomine*, and demanded recognition from the States of the Old World as Independent Political Communities. The extent to which the American, or at any rate the New England, Colonies had practically acted as if they were already in possession of full sovereignty is perhaps not sufficiently recognised by English students of Constitutional History. But it has been very strikingly set forth in the interesting volume issued by the Connecticut Historical Society (Hartford, Conn.) on the occasion of the celebration of the Two Hundred and Fiftieth Anniversary of the Adoption of the First Constitution of the State of Connecticut, held at Hartford, Conn., in January last.

The story which is told in the various Addresses delivered at the Commemoration is in every way remarkable. Not the least remarkable feature of the First Constitution of the State of Connecticut is one which the several speakers naturally brought out in strong relief, viz., the apparent utter unconsciousness on the part of the framers of the Constitution that they had any superior but God. A Mediæval Jurist would have been obliged to take refuge in his pleasing Legal fiction that it was a Fief held of God and the Sun.

Thus, in the address given by the Rev. Joseph H. Twichell, we find the following description of the Instrument by

which this State was founded: "In the institution of this Government," says Mr. Twichell (*op. cit.* p. 27), "there was recognized no outside human authority whatsoever as the source and basis of its powers. It was to be 'established according to God,' but no King, nor charter, nor Parliament, nor previously existing government had mention in the instrument upon which it was organized." Such being the case, it it is hardly to be wondered at, though Prof. Freeman might possibly not quite go the same length, that Mr. Twichell should assert that the "Connecticut Constitution of 1639 was the first, the original, practical assertion on earth of the democratic idea of government, of the principle that 'Governments derive their just powers from the consent of the governed.'"

This is undoubtedly very strong language. But if we take into consideration some points urged with great force by Mr. Twichell, we shall probably admit that there is a great deal to be said for his view, under all the circumstances. There was at the time, he contends, no real recognition of what he calls the Democratic principle in any of the other American colonies. "There was, to be sure," he says, "popular suffrage at Plymouth, but distinctly on a religious rather than a political construction of its purport. The Mayflower cabin compact, sometimes denominated the dawning point of American democracy, had formally acknowledged the King as the source of all authority. The government of the mother colony of Massachusetts was a government by royal charter, and at that time was exercised by a magistracy in limited association with a privileged class of freemen. It was the same in the New Haven colony, which was then and for twenty-six years thereafter a separate jurisdiction."

Such being the case, it is scarcely to be wondered at that Mr. Twichell should say of his State, in the words of Prof. Johnston, of Princeton, that "the government of the

people, by the people, for the people," first took shape in Connecticut, and consequently that Connecticut, and no other, be it Virginia or Massachusetts, can claim to be the birthplace of American Democracy, which must be looked at Hartford, Conn.

There can be no doubt, we think, on any fair construction of the First Constitution of Connecticut, that its framers did, and that, we must hold, designedly, omit all reference to any of the kin whom they had left beyond sea, or to that Kingly Government which nevertheless was, in the theory of English Law, at least, their Suzerain, to which they still owed allegiance.

This seems to us the weak link in the argument. There cannot be a doubt, Constitutionally speaking, that the Freemen of the new State of Connecticut, at its foundation in 1639, were the subjects of King Charles I. What, then, becomes of their pure Democracy, nay, their purest of all the pure Democracies that ever were on this earth? To a certain extent, we must confess that it appears to be reduced to the modest proportions of a Paper Democracy. Not that the Constitution itself was a mere Paper Constitution. Far from it. The builders builded deep, and they knew what they meant to build. We do not deny either their earnestness, or the practical reality of their Democratic Constitution. We only remind our Connecticut friends that, in Law, they were not at the time able to do what they are supposed to have done, consistently with the allegiance which they unquestionably owed, in theory, to the King whom they did not mention. To set up a pure Democracy, if the absence of a King be a necessary postulate of a pure Democracy, was not within the power of the men of the Plantations of Wethersfield, Windsor, and Hartford, when they banded themselves together to form the Body Politic of the State of Connecticut. The Body Politic of the King was in the way, though it is true

enough that there was an immense distance between the two, and that the obscurity in which they were hidden enabled those sturdy Freemen to be, in practice, self-governing as they were self-sufficient. So it was with the men of the Swiss Cantons, long before the Peace of Westphalia set the seal of European recognition on their Sovereignty. The case is very different with the men of the Dominion of Canada, for though the distance is not less, it is bridged by the ocean liner and the Submarine Cable. There is no hiding now.

The several Canadian or British North American Provinces federated into the Dominion of Canada are under allegiance to the Crown of the United Kingdom in 1889, just as the Colony of Connecticut was in 1639, only with this difference that their distance and their obscurity enabled the men of Connecticut to lay the foundations of a pure Democracy untroubled by their Suzerain, while the men of the Canadian Provinces have to act in the full light of day, and must act as loyal subjects of the British Crown, unless they should resolve to throw off their allegiance, in which case they would necessarily do so openly.

One of the most fundamental points of difference, therefore, between the Canadian Federation and that of the United States consists in this tie of allegiance. Is it fair, under the circumstances to blame the Canadians for any imperfections, or what at least appear such to an American eye, arising from the connection with the Mother Country? Yet this is what some American critics indulge in, while, on the other hand, some defenders of the Canadian Federation indulge in praise of their Constitution for features which may not appear altogether commendable to some Old World students of Constitutional Government.

The Canadian Dominion Constitution, we are told by some American critics, is only a bad copy of the Constitution of the United Kingdom. For the Queen is substituted

the Governor-General, within certain limitations, of course; for the House of Lords, a Senate nominated by the Governor-General; for the House of Commons, a House of the same name whose members are chosen by the people for five years. Some of these modifications were, as Judge Love admits (*Forum*, N.Y., Vol. VII., No. 6, for August, 1889, Art. *Canada's Form of Government*), "unavoidable." Those we need not waste time in discussing. The question whether the Senators ought to have been left to the nomination of the Governor-General, apparently in imitation of the creation of Peers by the Crown, is an arguable one, and we think there is a great deal to be said in favour of Judge Love's argument that such Senators are "the creatures of a creature," that "they represent nobody" and are "without a constituency."

The Senators of the Dominion of Canada do not, Judge Love remarks, "like the English House of Lords, represent a cherished sentiment," on the contrary, he somewhat severely says, "they represent nothing." It is not easy to see what can be the useful Constitutional function of a Legislative Chamber which represents "nobody and nothing." Probably a Canadian would urge that they may be held to represent the Provinces from which they are nominated, and probably also, we may take it that the Governor-General of Canada endeavours to nominate persons of more or less local good name, who may be called representative men, if not representative Senators. But such a body can never, it would seem, rise to the weight in the Ottawa Parliament which the Senate has in the Capitol at Washington, D.C. Yet those who have gone, with Mrs. Hodgson Burnett, *Through One Administration*, well know that all is not gold that glitters in the Senate House, at least, not pure gold. Of course Mrs. Burnett is a novelist, and Judge Love is a Judge. We make all due allowance for the difference, and while we do not rate the

novelist at a higher level than that which is fairly the meed of one who is an acknowledged keen observer of the lights and shades of American political life, we may say that on the whole it is clear that the balance, in the matter of power, inclines in favour of the Senate of the United States. If so, the question may well arise whether this balance might not be redressed by renouncing the nomination of the Canadian Senate? This is perhaps rather a question for the Canadians than for us to answer. But as a mere matter of Constitutionalism, there seems no necessary connection between what may be called Crown Nomination of the Senate and the maintenance of the Supremacy of the British Crown. The idea of reproducing the British Constitution in our Colonies is one which, however alluring it may be to an armchair critic, can only in fact be carried out subject to many modifications. If the broad outlines are preserved in a free Constitutional Government, that is about as much as we can either desire or deserve.

The arguments which have been brought forward on the Canadian side, in praise of the Dominion Constitution, do not always appear to us to be so well founded as might be desired. The Marquis of Lorne, for instance, speaking with all the weight of a former Governor-General, would seem to rest his claim for superiority on the fact that the Canadian can so easily upset the Administration of the day. "An adverse vote in the House of Representatives," Lord Lorne is cited by Judge Love as saying in an earlier issue of the *Forum*, "can, in Canada, at once dispossess the existing Government of power, and it must be succeeded by one more in consonance with the opinion of the country." Is this so certain? Does our experience in the Old World teach us that the existing Administration is always in consonance with the opinion of the country? We doubt it, for we do not think that the problem of Representation is yet adequately solved. There is frequently a considerable

gulf of difference of opinion between the Governors and the Governed in most parts of the Old World.

We should moreover, even if we did think Representation a problem adequately solved in our own country, and generally in our own hemisphere, hesitate to make the power of upsetting an Administration the test of a "Freedom" which, as Lord Lorne thinks, "no Canadian would ever consent to sacrifice." And this he considers to be a greater freedom than that enjoyed by the Citizen of the United States. In name, perhaps, but when the Canadian has overthrown the Administration which he dislikes, is he sure of having things more to his liking when another has succeeded? Do not considerable sections of our own population sympathise but little more with one Government than with another? We should ourselves prefer to make the absence of a desire to upset Administrations the test of a well administered Free Constitution. In carrying on the affairs of State the true motto seems to us to be "*L'Union fait la Force.*" It is far easier to plunge a country into the vortex of a General Election than to hold the reins of Government soberly, and neither too tight nor too loose. It is no doubt well for our Canadian fellow-subjects that their Federation is permissive, not compulsory, though advocates of a Paper symmetry may regret this liberty. The probabilities seem to be in favour of an extension rather than a restriction of the Federal system in British North America. But it is only Federation by analogy, as it were, and we ought not to be surprised if it does not, at any rate at present, bring forth all the good fruits of Federation proper. The question how far we can let the Colonists go in the direction of pure Federation is really the question how far we can keep up the semblance of a tie to the Mother Country while almost cutting it in practice. We do not believe that the "destiny" of Canada is absorption

into the American Union. There is certainly no present evidence of a drift in that direction on the part of the varied populations of the several Provinces of the Dominion. We rather hold that Canada has a Future of its own to work out, and very likely also more than one intricate problem in Federal Politics to solve. What we should be glad to do would be to give such help as we could towards the peaceful working out of these solutions of the Federal problem in Canada, by Canadians, for Canadians, and for Canada. And we equally wish for the United States that her citizens should peacefully work out some of the weighty problems which yet remain to them, for the United States, in the United States, and by the real natives of the United States, not by an Irish vote, or any other Foreign vote.

VII.—CURRENT NOTES ON INTERNATIONAL LAW.

General Boulanger in Belgium and England.

THE position of General Boulanger in Belgium and England has been the subject of some discussion among International Lawyers and in Continental Reviews devoted to Jurisprudence. The question has even been mooted in our own Press whether the General's Extradition or expulsion from the countries to which he has fled could not be demanded on the ground of International Law.

As a matter of fact, the answer does not require any very deep consideration. As regards (*a*) *Extradition*, there is certainly no provision in the Franco-Belgian Treaty of 1874 which would have justified such a demand in the Boulanger case. Cases arising in our own country are governed by the treaty of 1876, article 5 of which expressly excepts alleged political offences from the category of crimes for which Extradition can be demanded.

From the year 1849, when Lord Palmerston vigorously supported Turkey in her refusal to extradite Kossuth at the request of Austria and Russia, this principle has been invariably applied by Great Britain.

With reference to (*b*) *Expulsion*, undoubtedly any State has perfect power to expel a person from its territory; and whether this be effected by a timely diplomatic hint, such as was, it is understood, actually given in Brussels to General Boulanger, or by force, as has often happened, is a point entirely devoid of interest to the student of International Law.

Our own country, under ordinary circumstances, possesses no machinery by which foreigners, however objectionable, can be expelled for the mere alleged quality of being objectionable, so that as long as the "brav' Général" continues to live peaceably and quietly amongst us, without bringing himself within the pale of our Criminal Law, he is entitled to the same freedom from molestation which Louis Blanc, Félix Pyat, Louis Napoleon, the Comte de Paris, and others of his compatriots have at different times enjoyed in the days of their exile.

* * *

Privileges of Ambassadors' Servants.

A somewhat amusing question relative to the extent to which Ambassadorial privilege may cover the menial servants of Ministers accredited to a foreign Court is noticed in the pages of our able contemporary, the *Journal du Droit International Privé*. Paris., Nos. I. and II. for 1889.

It seems that on the 24th June, 1888, in view of the reassembling of the Prussian Chambers, the Chief of the Berlin Police had issued a decree placing certain restrictions on the traffic in the neighbourhood of the Palace.

M. Herbette, the French Ambassador at the German

Court, had hired for the occasion, from a local livery stable-keeper, a carriage and coachman, and the latter, on the day in question, on attempting to drive in a forbidden direction, was stopped by a police-officer, and informed that he was violating the regulation above mentioned.

A *fracas*, oral and otherwise, ensued, which culminated in the unfortunate coachman being brought before the Echevinal Tribunal (*Schöffengericht*) on the charge of resisting the police in the execution of their duty.

The accused claimed immunity from the jurisdiction of the Court on the ground of being a servant of the French Ambassador.

The plea was, however, held to be bad by reason of the fact that the prisoner was really the servant of the livery stable-keeper and not of the Minister, and that the carriage also belonged to the former, so as to preclude any application of the doctrine of Exterritoriality.

It was further laid down in the judgment that, in any case, the mere fact of the accused being a Prussian subject excluded him from the usual privileges accorded to Foreign Embassies.

As regards the last-mentioned ground it seems now to be a valid one, and it may be mentioned in passing that the Printed Personal Instructions issued to their Diplomatic Agents by the United States Government, expressly recognise this. (*See* Wharton, *International Law of the U.S.*, Vol. I., p. 644.)

"The personal immunity of a diplomatic agent," says the document referred to, "extends to the Ambassador's household, and especially to his secretaries. Generally his servants share therein; but this does not always apply when they are citizens or subjects of the country of his sojourn."

[*Note.*—It seems going too far to say that this cautiously worded paragraph expressly recognises that the Privilege does not extend to servants of an Ambassador when natives

of the country to which he is accredited. At most it admits that the Privilege will not "always" apply in such cases, which is a moderate way of putting the case, and is no doubt true. It may well be that to insist upon the Privilege would in such cases possibly not be prudent, but that is not a recognition that the Privilege does not exist, rather perhaps of the converse proposition. With regard to the ownership of the carriage, it appears to us that the local Court rather strained a point in favour of its jurisdiction. The carriage was unquestionably hired for the time being by the French Ambassador and was conveying him. If it had taken M. Herbette to a State banquet, would the Berlin police have prevented it from being called up as the French Ambassador's carriage, and have insisted upon its being called as the carriage of "the Livery stable-keeper" Blank? It seems to us that it might well have been argued that the carriage was, *pro tanto*, the French Ambassador's carriage.—Ed.]

Switzerland and the Wohlgemuth Incident.

The contest which raged so fiercely during the month of June between the German and Swiss Governments relative to the expulsion from Switzerland of the "agent provocateur" Wohlgemuth, deserves some consideration here, owing to certain theories connected with the question as one of International Law, which were mooted in the course of the discussion.

To examine the subject fairly, it is necessary to bear in mind what the simple facts of the case were.

In February, 1889, the German Agent, Wohlgemuth, addressed a letter, under a fictitious signature, to one Lutz, a Bavarian, residing at Bâle, in Switzerland, where he was in business as a tailor, with the object of inducing him to enter into the secret police service of the German Government.

The duties which Lutz would be required to perform were stated to be, *inter alia*, to report on the condition and transactions of the various political societies in Bâle and the neighbourhood, and also in Alsace-Lorraine and Baden. He was more particularly requested to communicate "all facts concerning the Socialist party, its organisation, agitation, and propaganda." In addition to all this he was instructed to neutralise, as far as possible, the Socialist movement, by actively countermining its efforts, among the labouring population with which he came into contact.

This latter object was succinctly and forcibly expressed by Wohlgemuth in a letter very much relied upon by the Swiss Government, which concluded with the words, significant to German readers: "Wühlen sie, nur lustig drauflos," which we can only inadequately render by the expression, "Go on gaily with your mole-like burrowing!"

Lutz, who was, in fact, on friendly terms with the Socialist party, acted a double part, and induced Wohlgemuth by false representations to meet him on 21st April, 1889, at Rheinfelden, having previously informed the Swiss Government of the fact. The consequence was that the German was arrested, compromising papers were found on him, and after being temporarily imprisoned, he was expelled from the country under a decree of the Federal Council, and the same measure was meted out to Lutz.

The German Government vigorously protested against this course, relying chiefly on two arguments: (*a*) That its agent was not guilty of any act deserving expulsion, and (*b*) that, in any case, the latter was an arbitrary act not sanctioned by International Comity.

Looked at from the point of view of International Law, the first of these objections can be dismissed at once as purely a question of fact and policy; and as regards the second, we can feel no serious doubt whatever in asserting

that any State has a perfect right to exclude or expel foreigners whose presence it may deem objectionable. There have been repeated instances of this on record, some of them quite recent, *e.g.*, the exclusion of pauper immigrants from the United States, and Germany herself has recently practised expulsion with regard to French newspaper correspondents, and was really, therefore, not coming into Court with clean hands in preferring this plea.

The only question which can usually arise is as to whether the State *by its own Constitution* has powers of the kind mentioned. In the case of Switzerland, authority is expressly given by Article 70 of the Federal Constitution: "The Confederation has a right to remove from its territory strangers who compromise the internal or external security of Switzerland."

The plea put forward by Germany that the arrest was brought about by a discreditable trick could hardly be of much weight, since it provoked the obvious retort that the trick was merely a counterpart of Wohlgemuth's own conduct throughout the affair,—he was in fact simply "hoist with his own petard."

The offence itself was undoubtedly serious, consisting, as it did, not only of espionage practised in a foreign State, but of the attempt to organise a system of espionage and agitation within that State.

The real ground of complaint by Germany revealed itself at a somewhat later stage of the affair, consisting in the general asylum afforded by the Helvetic Confederation to political refugees from all countries of Europe. This fact was pointed out to the Federal Government as constituting a grave and standing danger to foreign States, and in these representations it is understood that Germany was supported by Russia, Austria, and Italy.

Whether the plea so advanced be true or false does not concern us here at present, in so far as it may be con-

sidered a purely political one, but the ground on which the German Government based its contention is material to the present question.

It was argued that by Article 2 of the Treaty between Germany and Switzerland, of 1876, it was provided that "To acquire a residence, or to establish themselves in Switzerland, Germans should be provided with a certificate of origin and a further certificate . . . . to the effect that the bearer is in possession of his civil rights, and has an irreproachable reputation." If this had been carried out, it was urged, none of the unpleasant incidents in question could have taken place. It appears to us that the answer of the Federal Government to this contention was complete and indisputable, viz., that this article merely gave a treaty-right to them to require of German immigrants certificates of the nature mentioned, but was in no way obligatory on the Helvetic Confederation. "Such an interpretation," said M. Droz, the Swiss Minister, "is contrary to the spirit of the Treaty, and would tend to subject the admission of foreigners into our territory to the assent of a foreign Government, and would thus virtually place our right of asylum at its mercy, and deprive us of an essential attribute of our sovereignty."*

The last remark is noteworthy in view of the fact that the guaranteed neutral position of Switzerland had been referred to as to some extent placing that country in a less sovereign condition than it might otherwise have claimed to occupy. As a matter of fact, this seems to be a most unwarrantable proposition, and was justly repudiated by the Federal Government on the ground that there is not the slightest suggestion of such a thing in the Treaty of Vienna, of 20th November, 1815, by which the neutrality was guaranteed by the Great Powers of Europe.

* [On this subject, cf. *Law Magazine and Review*, No. CCXL. or May, 1881, Art *Extradition and the Right of Asylum*.—Ed.

It is to be hoped, however, that the establishment of an Attorney-General of the Confederation, and the proposal of the Swiss Government to present a law facilitating the repression of political offences, will prove a satisfactory answer to the representations of the Powers, and that the Wohlgemuth Incident may now be regarded as terminated.

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Lex Loci Contractûs: Charter-party.

The modern tendency, which was examined in some detail in a recent number of this *Review*, to determine the law governing the intrinsic validity of a contract by careful enquiry into all the circumstances that point to the intention of the parties, was well illustrated in the case of *In re The Missouri Steamship Co.*, lately decided by the Court of Appeal (W.N., 1889, 90).

The point at issue was practically identical with that of the well-known case of *Lloyd* v. *Guibert*, L.R. 1 Q.B. 122, and other cases. The Court upheld the decision of Chitty, J., in finding that all the circumstances of the contract, taken together, combined to lead to the inference that the parties intended the Law of England to apply.

It will be observed that in this case, the law held to be applicable was the Law of the Ship's Flag, but the decision was not based on any presumption in favour of the Law of the Flag so much as on the facts already mentioned, thus entirely upholding the earlier decisions in *The Gaetano e Maria*, 7 P.D. 137, *The Chartered Mercantile Bk. of England* v. *The Netherlands India Steam Navigation Co.*, L.R. 10 Q.B.D. 540, and *Jacobs* v. *Crédit Lyonnais*, L.R. 12 Q.B.D. 589.

* * *

Jurisdiction: Elected Domicile.

The principle that an artificial *forum contractûs* may be established by the election of a domicile in respect of a particular matter or contract, was very clearly illustrated

in a recent case before the Divisional Court, *The Thames Sulphur Co.* v. *La Société des Métaux*. It is reported most fully (as, we find, is frequently the case where a point of International Law is in dispute) in the *Times Law Reports*, 1889, p. 118.

The facts shewed that a contract was made in France, by which the English company agreed to sell certain quantities of copper to the defendants, a French company domiciled in France, and having no agency in our own country.

It was specially stipulated that the agreement was to be construed by English Law, and the French parties agreed to submit to the jurisdiction of the High Court of Justice in England, and appointed certain persons in London "on whom or their agents any writ or process in respect of any matter arising out of this contract might be served . . . . and the purchasers thereby for the purposes of the contract elected a domicile at the office of the persons" so appointed.

An action for breach was brought by the plaintiffs in our own Courts, the writ being served in London on one of the persons above mentioned.

Coleridge, L.C.J., and Field, J., held that the Service was good, on the ground that though not valid *primâ facie*, by the Rules of the Supreme Court, the parties had contracted themselves out of the scope of the Rules by electing a domicile in England and agents for accepting Service on their behalf.

The *ratio decidendi* of the case is in all respects in accordance with that in *Vallée* v. *Dumergue*, 4 Ex. 290, and *Copin* v. *Adamson*, L.R. 1 Ex. D. 17. The same subject was to some extent dealt with in three still more recent cases, viz., *Mason and Barry* v. *Comptoir d'Escompte de Paris*, *Haggin* v. *The Same*, W.N. 1889, p. 129, and *Russell* v. *Cambefort*, W.N. 1889, 139. In the first two cases, which

were brought before the Court of Appeal together in one application, the facts were very similar to those in the well-known case of *Newby* v. *Van Oppen*, L.R. 7 Q.B. 293. In each case the question was whether a writ can be served in this country on the manager of the London Agency of a foreign Corporation.

It will be remembered that in Newby's case, the question was also mooted as to whether a foreign Corporation could be sued in an English Court at all, and this seems to have been again raised in the more recent cases.

The Court of Appeal decided that the latter came entirely within the principle of the decision in Newby's case, and held that the Service was a good one.

It must be confessed that this goes even further than the older decision, since in Newby's case the contract, which was the subject of the action, was one made in England in the ordinary course of business of the Foreign Corporation, while in the recent cases the actions were brought on guarantees given by the French Corporation in Paris, a branch of the business which was not within the powers of the London Agency.

The Court of Appeal seems to have based its judgment largely on the fact of the Parisian Corporation having a *domicile* in this country as well as in France.

In the third case mentioned above, *Russell* v. *Cambefort*, the facts were very similar to those in the cases just referred to, with the exception that the defendants were a foreign partnership, and not a corporation aggregate. On the ground that a private partnership could not exist apart from the individuals who composed it, and that in this case the members of the defendants' firm were all French subjects, resident in France, the case was held to be distinguishable, and the service of the writ in England was set aside.

JOHN M. GOVER.

Quarterly Notes.

Privilege of Parliament.

Recent circumstances have brought into some prominence a subject of no little Constitutional interest, viz., Privilege, as claimed by the members of our Legislature. The name is, in some respects, one to conjure by. It calls up visions of a disappointed King, foiled in his attempt to arrest obnoxious members of the House of Commons, filling the Speaker's chair, with which he had made bold for the nonce, and after an enquiry for Mr. Pym and a short allocution followed by a "dreadful silence," recognising himself foiled, leaving the House, whose members, as he left, raised the cry of "Privilege." With this cry ringing in his ears, as Mr. Forster puts it, Charles passed through the angry lines of members back to his Palace, surrounded by the hosts of armed adherents who had accompanied him to the House of Commons.

Privilege is a word of wide import, and it has been made at times to cover much which could with difficulty be accepted under that name.

It has at times been a useful means of resistance to arbitrary rule. It has also been ingeniously twisted by a James I. and a Charles I. into a fresh expansion of the Royal power. Both James and Charles professed great regard for Parliamentary Privilege, but they did so on the express ground that it flowed from a grant of the Crown. For such a Privilege, no Parliament which knew its own history or cared for its own dignity would have cared to fight, as the most famous Parliaments of James and Charles did fight. But not every claim to Privilege which has been asserted by either House is a lawful one, and

some have been very evanescent. Some have also been very extravagant. Under the latter class perhaps may be ranged such a claim as has given birth to a long drawn out trial before a Special Commission. May we not hope that this claim will also be found to take its place among the evanescent assertions of Privilege? It was suggested by a late high authority that it were well to codify the Law of Privilege. We wish joy, by anticipation, to the Tribonian to whom such a thorny task may be entrusted, and hope he may not be voted in contempt of the High Court of Parliament.

Trials for Murder by Poison.

There are probably few kinds of cases more difficult alike for Judge and for Jury. In scarcely any cases is there, almost invariably, so direct a conflict of expert testimony. We do not doubt that the witnesses on both sides speak the truth according to their respective views of Toxicology, but those views are more discordant than in almost any other class of cases that ever comes before the Courts.

Of the two, the Judge is more likely than the average Juryman to have paid some attention to the subject, which must more or less have forced itself upon him in his reading, if not in his practice at the Bar. How the Juryman ever makes up his mind in such cases we do not profess to know. But we should scarcely be surprised if the perhaps not very dignified solution, Heads or Tails, were sometimes resorted to for the obtaining of the required Unanimity. Perhaps these are among the cases which may most give rise to a doubt in the English mind,—if the English mind can ever entertain a doubt as to the superlative excellence of everything bearing the Hall mark "English"—as to whether there may not be something to be said in favour of the Scottish Jury, with its Majority

verdict, and its intermediate verdict of "Not Proven." That such changes will never be admitted into the English system, we are not rash enough to prophesy, though we are not the first and shall probably not be the last to throw out the suggestion that the English mind might do worse than adopt them.

There is another matter connected with the cases of which we are writing which speaks very badly for the relations between the People and the Courts. We observe that in a recent *cause célèbre* (for such it may in a certain sense be called), the populace took up the side of the prisoner, and hooted one Judge and cheered the other. This is a bad sign, though there are other bad signs to which attention has never properly been directed as yet. We do not for a moment suppose that our Judicial Bench will be disturbed by this attitude of King Mob. The Judges care nought either for cheers or jeers, except in so far as they may note with regret symptoms of insubordination to Law. But we believe it is the case to this day that the fishing village of Brixham in Devonshire, in the near neighbourhood of one of our most celebrated winter resorts, knows no better mode of welcoming the stranger within its gates than the traditional miner's "Heave half a brick at him." How Brixham would treat Judges if it were an Assize town may easily be imagined. Liverpool is perhaps only to be considered in the light of an overgrown Brixham. But the law-abiding sentiment must be extremely slight in the lower strata of the population of either place.

It is possible, if not probable, that the recent trial for murder, to which we have alluded, may be taken as affording a fresh instance of the evils wrought by what is called the closing of the mouth of the accused. We do not think, on the evidence before us, that the case really was one which could fairly be added to the list of those which might give rise to a desire for an alteration of the existing Law. On

the broad question, there is a great deal to be said on both sides. We are aware of the generally favourable attitude held towards it in the United States, as evinced by the remarkable replies to a *Questionnaire* sent out some years ago to the Chief Justices and Attornies-General of every State in the Union, and all the British North American Provinces, by the Social Science Association, on the motion of its Department of Jurisprudence. The information obtained constituted a mass of valuable materials for arriving at some sort of a conclusion on the question, which is one of acknowledged difficulty. But we are not sure that, on the whole, it did not leave us pretty much where we were before, as to the desirableness of the change so frequently advocated, for an old country like ours, and in the midst of such a complicated network of related social problems.

Reviews.

Annuaire de Législation Etrangère. Annuaire de Législation Française. Bulletins. Paris. F. Pichon. 1888-9. [Published for the Society of Comparative Legislation.]

In drawing the attention of our readers to the recent publications of our valued French contemporaries, we cannot pass over in silence a Commemoration which has just been held in Paris, within that greater Commemoration symbolised by the Tour Eiffel,—viz., the Twenty-fifth Anniversary of the Foundation of the Society which brings out these most useful Year-Books of Comparative Legislation.

Those of our readers who have followed us with a more or less continuous attention during the past fourteen years will know how frequently we have expressed our sense of gratitude

to our *confrères* in Paris for the light which their labours have so constantly thrown on the Laws, whether Customary or Codified, written or unwritten, of the most widely-differing and distant races.

Whether through the Papers read at the Society's meetings in Paris, and printed in the *Bulletins*, or through those monuments of patient toil, the *Annuaires* of Foreign Legislation, or through the translations of Foreign Codes, undertaken by the Society in concert with the Comité de Législation Etrangère at the Ministry of Justice, the help of this valuable Society seems always ready to our hand.

As the original *Annuaire* dealt exclusively with Foreign States, as was natural, there might have seemed to be a certain incompleteness in the Society's plan of operations. You are a Society of Comparative Legislation, it might have been objected by a somewhat captious critic, but you do not enable us to compare other Legislations with your own. This objection, though the Society might have deemed it hyper-critical, has of late years been met by the addition to the publications of the Society of an *Annuaire* of French Legislation. This is unquestionably a valuable addition to the already considerable list of working tools which are placed in the hands of the Jurist and the Statesman, and the student of Comparative Politics, by our most meritorious *confrères* of the Rue de Rennes, Paris.

To take up a year's issue of the *Bulletins*, or either *Annuaire*, is to find one's self following, under able guidance, the Parliamentary debates of the principal National Assemblies of the world, and tracing the workings of the minds of the several Nations in their Legislation. To have all this presented within the compass of a moderate volume is a boon to the student which it would be difficult to over-estimate.

Not long ago we were enabled, in the course of our consideration of Dr. Rattigan's recent Treatise on *Jurisprudence*, to point out, through the communications made to the Society of Comparative Legislation, what singularly interesting features of Archaic Society were revealed as still existing in Croatia, in the shape of the Zadruga, and how unfortunate a result appeared to have been produced by the well-meant efforts of Austrian Legislators to substitute Individual for Community ownership among the Croats. We are not sure that the Zadruga had come to the knowledge of the late Sir Henry Maine, though he did deal

with some of the other forms of Community ownership in South-Eastern Europe. We cannot doubt that his interest would have been keenly aroused in Communities which a mistaken zeal for Nineteenth Century uniformity had almost slain, only to find itself practically obliged to call them to life again. Among the most recent contributions to the *Bulletins* we find papers by M. R. Saleilles on the Obligation in the Draft Civil Code for the German Empire, and by Dr. Pappafava, of Zara, on the Execution of Notarial Acts in Austrian Legislation. The *Annuaire* of Foreign Legislation published last year, although comprising the Texts or Summaries of the Legislation of 1887 in many lands and varying climes, from Iceland to Uruguay, is yet contained within what we must call the reasonable limits of a perfectly workable volume of a thousand pages. We are glad to see that the latest Foreign *Annuaire* has been enriched by the addition of what the writer of the Introduction calls a "new State,"—new, that is, to the pages of the *Annuaire*—viz., British India. Whether the country which we have lately gratified by the name of the Indian Empire can strictly speaking be called a State, we will not now stop to discuss. It is sufficient for us here to note the warm welcome with which the adhesion of the Government of India to the scheme of the Society's operations has been received.

Of the *Annuaire* for French Legislation we may say that its execution is as careful as that of its Foreign companion, while the advantage of being on the spot enables the Editors to come more nearly down to date. Thus the volume published this year contains the Texts and Summaries of French Legislation for 1888. From the point of view of International Law, the Law forbidding Aliens to fish in the Territorial waters of France and Algeria may be noted, as bearing upon some aspects of that great Fisheries question which has caused, at different times, considerable friction between British, French and Belgian fishermen, and which has gone some way towards disturbing the good relations of Great Britain and the United States. We may further remark that Tunisia and Algeria both figure in the *Annuaire* of French Legislation, so that the reader who consults its pages, and has also the Foreign *Annuaire* at his elbow, can at will instruct himself and others on the most recent phases of Legislative activity, alike in the Old World and the New.

The Laws concerning Religious Worship and Mortmain and Charitable Uses. By JOHN JENKINS, a District Registrar of the High Court of Justice. Waterlow Bros. & Layton. 1885.

The subject which occupies the first half of Mr. Jenkins's title-page is one of considerable interest at the present time, and even more so perhaps than at the moment chosen by him for publication. But there is not much in his volume of the kind which perhaps nine readers out of ten would expect from the title. There is a good deal of historical disquisition, dealing more or less directly with the history of the Church of England from the Middle Ages down to our own days, in the course of which Mr. Jenkins shews a great distrust of the influence exercised "during what are called the Middle Ages," as he somewhat oddly puts it, by those whom he equally oddly calls "Popish priests." Mr. Jenkins's estimate of Stephen Langton, whom he calls a "servile instrument of the Romish See," strikes us as about the most curious specimen we remember to have met with in the way of inability to grasp the facts, which in Langton's case happen to be remarkably plain facts, of mediæval English History. The truth that Stephen Langton was the soul of the resistance of the Barons to the tyranny of John seems never to have dawned upon Mr. Jenkins, and it is perhaps too much to expect that it should at this date, after the forty years of practice to which he refers in his Preface. But the mental warp, of which his description of Langton is a marked sign, affects the whole of his references to Mediæval Religion. It would, we fear, be quite useless to suggest to Mr. Jenkins that, as a matter of fact, the mediæval Church of England was neither in itself, as a body, nor in its Primates as its official leaders, a "servile instrument of the Romish See." It maintained a friendly relation with Rome, as the First See of Latin Christendom, but it was in no sense "servile" in its attachment to Rome. When Pope and Anti-Pope both claimed England's obedience, England sometimes took a side, sometimes, as in Archbishop Chichele's days, declined to take a side at all. The language of English Bishops, indeed, as in the case of Grosseteste, was often quite as outspoken in the matter of any shortcomings on the part of the Roman See as that of either Wycliffe or any of the Sixteenth Century Reformers.

That a great deal of land had a tendency to fall into the

hands of the religious Orders during the period of enthusiasm in favour of those Orders which may be taken to have culminated in the thirteenth century, there can, of course, be no doubt. And equally without doubt, the re-issue of Magna Charta by Henry III. contained a clause directly levelled against the withdrawal of land from lay to Religious holding. But there is no need to suppose that the tone of thought which led to land being so withdrawn was the result of "undue influence." There was, at that date, plenty of perfectly legitimate influence tending in that direction, and hence the necessity for special legislation.

Coming down to later times, one of the most interesting cases given at considerable length by Mr. Jenkins is that of Lady Hewley's Charity, which came up for decision under Vice-Chancellor Shadwell, and Lord Chancellors Cottenham and Lyndhurst. The case was one of great gravity, and involved far-reaching questions of construction, as well as much argument of a mixed historical and theological character. No one, we think, could read the extracts from the several Judgments given in *Attorney-General* v. *Pearson*, and *Attorney-General* v. *Shore*, printed by Mr. Jenkins, without feeling that the questions at issue were treated with all the care and thought that they demanded. The change by which Trusts clearly founded, as the Courts held, for persons professing Trinitarian Doctrine, had come to be applied to persons whom both the English Law of Lady Hewley's day and Lady Hewley's own chaplain would have called "blasphemous," as denying the Doctrine of the Trinity, really constitutes one of the most curious pages in the history of English Nonconformity. There is a great deal of useful and interesting matter in Mr. Jenkins's book, and we should like to see a new edition with the Historical narrative thoroughly recast on sound critical principles.

A Treatise on the Law of Evidence in Scotland. By WILLIAM GILLESPIE DICKSON, Advocate. Recast, adapted to the present state of the Law, and in part re-written, by P. J. HAMILTON GRIERSON, B.A., Advocate. Edinburgh. T. & T. Clark. 1887.

In dealing with Mr. Dickson's well-known work on the Law of Evidence in Scotland, the Editor of this Edition states that, in order to meet in an adequate manner changes effected by Legislation, and by alteration of Rules of Procedure, a re-cast-

ing of the whole has become necessary; and he claims not only that he provides a statement of the Law of to-day, but that this law is more quickly discoverable by reason of greater conciseness and improved readiness of reference. Nevertheless the general arrangement of the main divisions of the book is practically identical with that of the original work, though Mr. Grierson, in order to satisfy all parties, has thought it worth while to append a Table shewing the numbers of the sections corresponding to those in the original editions. We take it that such previous editions are only two, and that the interposing one is that of Mr. Skelton in 1864.

The change of Editor, on this occasion, we may presume to be due to the working time of Mr. Skelton being occupied with the duties of his office as Secretary to the Board of Supervision, and to the fact of his leisure hours being devoted to those heroes and heroines of the Stuart Race, with some of whose deeds and sorrows he has from time to time made us familiar. That the present task could not have been accomplished without much labour we feel sure; effective re-arrangement and compression are not to be attained without persistent work and accurate watchfulness. So far as we can judge, the two volumes may be placed on our shelves with the conviction that we have in them an ample store of exact information upon the Law of Evidence in Scotland, and, to some extent, upon that of England also. The arrangement into Sections or Paragraphs is sometimes utilised by confining to one a broad statement of some principle of Law, and to the succeeding one the examples illustrative of that principle of Law or general rule of Practice; and it would have tended to clearness if such an alternative ordering could have been uniformly adopted. But we do not assert that in a work of this extent the method in question was necessarily practicable: we cannot always have the succinct rendering of Sir James Stephen in his Treatise on this subject. The present Editor and his predecessors have all made ample reference to the English and American works on the Law of Evidence; and frequently the decisions of English Courts, or the expressions of English authors, are quoted as the Law applicable in the Courts of Scotland without further note, sometimes, than the particular authority cited. The authors, however, bring under notice in an instructive manner differences between the two systems, as the occasion for so doing from time to time arises.

While the study of the rules enforceable north of the Tweed and the extent of their correspondence with our own, must be of interest to the English practitioner, the strange and curious examples ever and anon introduced to illustrate the text are well calculated to rivet the attention of the southern reader. As regards the degree of proof generally required, there is perhaps greater strictness, or more properly speaking greater formality of procedure attaching to some matters of proof, in Scotland, and there is the peculiarity of the "oath of refence," but we gather both from this work and other sources that the tendency is to a further approximation to the law prevailing in England. Although the changes in the Scottish Legal system have in recent years been considerable, they are not to be compared with the modifications or "revolutions" accomplished in respect of that prevailing in England. To the labour entailed on authors by such changes, Mr. Taylor makes allusion in a very quaint and sarcastic Preface to the latest Edition of his well-known work. Coming to minor points, we would commend the plan in Mr. Grierson's edition of intercalating between the various paragraphs the authorities referred to, instead of placing these at the foot of the page; the immediate view, and the applicability of the authorities founded on, to the paragraph above them, appears to us decidedly advantageous. We have further the usual Table of Statutes and Acts of Sederunt, and, in very clear type and convenient form, a General Index and Index of Cases.

THE

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Quarterly Digest

OF

ALL REPORTED CASES,

IN THE

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BY

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FOR AUGUST, SEPTEMBER, AND OCTOBER, 1888.

By C. H. LOMAX, M.A., of the Inner Temple, Barrister-at-Law.

Administration:—

(i.) **Ch. D.**—*Assets—Partial Intestacy—Order of Application.*—A married woman having separate personal estate, and a power of appointment by will over personalty, bequeathed and appointed (after legacies) all her property to her executors, on trust to pay debts and legacies, and the residue on trust for persons named. She survived her husband, acquired other personal estate, and did not republish her will. *Held*, that the separate personalty and the after-acquired personalty must contribute rateably, and before the appointed estate, to pay funeral and testamentary expenses, and debts contracted after coverture.—*Green* v. *Burgess*, 59 L.T. 310.

(ii.) **Q. B. D.**—*Benefit Society—Rules—Death Allowance—Payment to Relative—Administrator.*—By the rules of a benefit society the committee had power in case of the death of a member unmarried and intestate, to pay his death allowance to his parents, brothers, or sisters, or any of them, in such proportions as in their discretion they might think fit. *Held*, that the administrator of a deceased member could not recover from the sister of the deceased a sum which had been paid to her by the committee under the said rules.—*Ashby* v. *Costin*, L.R. 21 Q.B.D. 401; 57 L.J. Q.B. 491; 59 L.T. 224.

Arbitration:—

(iii.) **C. A.**—*Incorporation in Submission of Common Law Procedure Act 1854—Revocation—3 & 4 Wm. IV., c. 42, s. 39.*—A clause in a submission to arbitration providing that the Common Law Procedure Act, 1854, should apply, is equivalent to an agreement that the submission should be made a rule of Court; and, therefore, the submission is not revocable without the leave of the Court.—*In re Mitchell and Izard and Governor of Ceylon*, L.R. 21 Q.B.D. 408; 36 W.R. 873.

See Costs, p. 8, ii.

Bankruptcy :—

(i.) **Q. B. D.**—*Abuse of Process—Application by Creditor on Behalf of Bankrupt.*—An application by one creditor to expunge the proof of another creditor will not be granted if it appears that the sole object of the application is to benefit the bankrupt.—*E. p. Rooney; in re Tallerman*, 57 L.J. Q.B. 509; 36 W.R. 864.

(ii.) **Q. B. D.**—*Composition—Approval of Court—Bankrupt's Conduct—Bankruptcy Act*, 1883, *ss.* 18, 23.—Before the Court approves of a composition or scheme, which has been accepted by the majority of the creditors, it must consider not only whether the creditors are likely to be benefited by it, but also the requirements of commercial morality, by examining the debtor's conduct with reference to trading.—*E. p. McTear; re McTear*, 59 L.T. 150.

(iii.) **Q. B. D.**—*Costs—Higher or Lower Scale—Discretion of Court—Bankruptcy Rules*, 1886, *r.* 112, *sub-r.* 2.—Costs which are in the discretion of the Court, and which, in consequence of the exercise of that discretion, may eventually come to be paid out of the estate, are not affected as to taxation by Rule 112. Therefore, when an order obtained by the official receiver against a person outside the bankruptcy was discharged on appeal with costs, the official receiver to recoup himself out of the estate the costs so directed to be paid by him, the appellant's costs must be taxed on the higher scale.—*E. p. Jaynes; in re Dowson*, 57 L.J. Q.B. 522; 36 W.R. 864.

(iv.) **C. A.**—*Debtor's Petition—Single Creditor—Conditional Discharge—Judgment—Bankruptcy Act*, 1883, *s.* 28, *sub-s.* 6.—*Quære*, whether a debtor with only one creditor can present a petition, and obtain a complete discharge. The Court will not require a bankrupt to consent to judgment being entered for the balance of his debts, as a condition of his discharge, unless there is some evidence that he is likely to acquire property sufficient to satisfy such judgment.—*E. p. Arnaud; in re Bullen*, 36 W.R. 836.

(v.) **Q. B. D.**—*Execution—Sheriff—Retention of Proceeds—Bankruptcy Act*, 1883, *s.* 46.—The fourteen days during which the sheriff must retain the proceeds of goods sold under an execution, run from the sale, not from the time of the receipt of the proceeds by him.—*E. p. Ross; in re Cripps*, 59 L.T. 341; 36 W.R. 845.

(vi.) **Q. B. D.**—*Onerous Property—Disclaimer—Crown—Bankruptcy Act*, 1883, *ss.* 55, 150.—The provisions of the Bankruptcy Act relating to the disclaimer of onerous property are binding on the Crown.—*E. p. Commissioners of Woods and Forests; re Thomas*, L.R. 21 Q.B.D. 380.

(vii.) **Q. B. D.**—*Power of Judge to Rescind Order of Registrar—Substitution of Petitioning Creditor—Bankruptcy Act*, 1883, *ss.* 104, 107.—A County Court Judge cannot rescind an order made by the registrar. The debtor executed a deed of assignment, to which all the creditors except two assented. A petition was filed against him by assenting creditors, alleging the execution of the deed as an act of bankruptcy, and was dismissed by the registrar on the ground that the petitioners had assented to the deed. More than three months after the execution of the deed, the non-assenting creditors applied to the County Court Judge to rescind the registrar's order, and to substitute themselves as petitioners. *Held*, that the judge ought to have refused the application.—*E. p. Maughan; re Maughan*, 57 L.J. Q.B. 487; 59 L.T. 253; 36 W.R. 846.

(viii.) **Q. B. D.**—*Receiving Order—County Court Judge—In Lieu of Committal—Bankruptcy Act*, 1883, *s.* 103, *sub-s.* (5).—Where a County Court

judge cannot make a committal order because the judgment debtor has no means to satisfy the debt, he can make a receiving order "in lieu" thereof.—*Reg. v. Sussex Judge*, 59 L.T. 32.

(i.) **Q. B. D.**—*Taxation of Costs—Solicitor doing Administrative Work—Bankruptcy Act*, 1883, *s.* 57 (2).—Where a trustee in bankruptcy has, with the sanction of the committee of inspection, employed a solicitor to assist him in performing the duties of trustee with regard to the distribution of the estate, the giving of notices, and the winding-up of the bankruptcy, the costs of the solicitor must be taxed on the principle that he is not to charge solicitor's charges for administrative work, but only such charges as are fair and reasonable, having regard to the work done.—*E. p. Board of Trade; re Pryor*, 59 L.T. 256.

Bill of Sale:—

(ii.) **Ch. D.**—*Consideration—Bills of Sale Act*, 1882, *s.* 8.—A bill of sale must shew the real agreement between the parties, and must not be dependent for its real effect upon some other instrument.—*Sharp v. McHenry*, L.R. 36 Ch. D. 427.

(iii.) **Q. B. D.**—*Deviation from Statutory Form—Bills of Sale Act* (1878) *Amendment Act*, 1882, *ss.* 7, 9.—A bill of sale containing a power to seize if the "mortgagors should take the benefit of any Bankruptcy Act," is void, the power being wider than that in the statutory form.—*Gilroy v. Bowey*, 59 L.T. 223.

(iv.) **Ch. D.**—*Hiring Agreement—Loan—Bills of Sale Act*, 1878, *Amendment Act*, 1882.—A. sold his furniture to X. for £100; the money was paid, but no receipt given. Soon after X. agreed to let the furniture to A. for a term, at a rent payable as follows: £1 (interest) on the signing of the agreement, and two instalments of £50 each, payable as therein mentioned. On breach of any of the stipulations, X. was to have power to remove and sell the furniture. *Held*, that the agreement was not a bill of sale.—*Redhead v. Westwood*, 59 L.T. 293.

(v.) **C. A.**—*Inventory with Receipt—Transaction Perfect without Document—Bills of Sale Act*, 1878, *ss.* 4, 8.—Goods, the property of C., were warehoused in the name of J., who paid the charges. C. agreed to sell them to J. and R. The purchase money was paid, and C. sent J. and R. a list of the goods with a receipt annexed, and the goods were sent to them on a delivery order signed by J. *Held*, that there was a complete transaction of sale and purchase, by which J. and R. acquired a title to the goods, independently of the list and receipt, which document was therefore not a bill of sale.—*Shepherd v. Pulbrook*, 59 L.T. 288.

(vi.) **Q. B. D.**—"*Inventory with Receipt Attached*"—*Document not an Assurance.*—The goods of A. were seized by the sheriff and sold to X. by private contract. X. received from the sheriff an inventory with a receipt attached. X. agreed to let them to A.'s wife, and A. remained in possession of the goods, which were seized under a writ issued by the plaintiff. *Held*, by Manisty, J., that the inventory and receipt constituted a bill of sale, and should have been registered, and therefore the plaintiff was entitled. *Held*, by Stephen, J., that X. had a good title independently of the inventory and receipt, which did not require registration, and that X. was entitled.—*Haydon v. Brown*, 59 L.T. 330.

(vii.) **C. A.**—*Registration—Renewal—Bills of Sale Act*, 1878, *ss.* 11, 14, 23.—Where a bill of sale was, at the commencement of the Bills of Sale Act, 1878, void for want of renewal of registration, the time for renewal cannot be extended under s. 14.—*E. p. Chief Official Receiver, in re Emery*, L.R. 21 Q.B.D. 405.

(i.) **Q. B. D.**—*Validity—Maintenance of Security—Statutory Form—Bills of Sale Act*, 1882, *ss.* 7, 9.—A bill of sale contained a covenant by the grantor to pay all rates, taxes, and outgoings whatsoever in respect of the premises; in default, the grantee to pay the same and charge the same to the grantor, and all expenses to which he might be put, which said sums were to be "added to and form part of this security. The bill contained a power to seize for the causes mentioned in section 7 of the Act of 1882. *Held*, that the bill of sale gave the grantee a wider right of seizure than if the statutory form had been followed, and was therefore bad.—*Macey* v. *Gilbert*, L.R. 57 L.J. Q.B. 461.

Bond:—

(ii.) **Ch. D.**—*Illegal Consideration—Duress—Stipulation as to Conduct of Criminal Proceedings.*—A. introduced B. to X., through whose frauds B. lost money. B. prosecuted X. There was a conversation between A. and B. about A. being included in the charge. B. said that if A. would give some security the charge against him would be abandoned, and that counsel should be instructed to say that A. had acted honourably. A. executed a bond and mortgage. The Court held on the evidence that the bond and mortgage were not given under threats of criminal proceedings, or under undue pressure. *Held*, that the consideration included stipulations as to the conduct of pending criminal proceedings, by which their course and result might have been affected, and was therefore illegal and bad, and that the bond and mortgage were obtained without good and sufficient consideration, but were not obtained by duress.—*Lound* v. *Grimswade*, 57 L.J. Ch. 725; 59 L.T. 168.

Building Society:—

(iii.) **Ch. D.**—*Arbitration—Dispute between Society and Member—Building Societies Act*, 1884, *s.* 2.—A building society brought an action against directors to recover money which they were alleged to have received in a fiduciary capacity and to have retained. *Held*, that it was not a question which ought to be referred to arbitration.—*Municipal Permanent Building Society* v. *Richards*, 58 L.T. 931.

(iv.) **Q. B. D.**—*Investment Shares—Interest on Shares Withdrawn till Notice of Withdrawal.*—The rules of a building society provided (1) that interest should be allowed on investment shares at such rate as the board should fix; (2) that a member withdrawing part of the money at the credit of his share account should not be paid interest thereon at a rate exceeding the amount allowed on deposits; (3) that interest on shares should cease at the date of notice of withdrawal. After the plaintiff became an investing member the board resolved that interest on money withdrawn should not exceed 2½ per cent., and afterwards, that no interest should be paid on "interim withdrawals." The plaintiff had no notice of these resolutions. He withdrew part of his investment shares. *Held*, that he was entitled to interest from the date of the last dividend to the date of the notice of withdrawal at 4 per cent., the amount allowed on deposits.—*Perratt* v. *The London Scottish Permanent Benefit Building Society*, 59 L.T. 31.

(v.) **Q. B. D.**—*Winding-up—Voluntary—Building Societies Act*, 1874, *s.* 32—*Companies Acts*, 1862 *&* 1867.—A building society established under the Building Societies Act, 1874, may be wound-up voluntarily under the Companies Acts. In such a winding-up a claim may be made by summons for the repayment of money lent out of the funds of the society contrary to its rules.—*In re Sunderland 32nd Universal Building Society*, L.R. 21 Q.B.D. 347.

Bye-Law :—

(i.) **P. C.**—*Reasonableness—Ultra Vires—Regulating Interments.*—A power to regulate interments involves power to prohibit them in specified places. A bye-law is not *ultra vires* because in certain circumstances it may prevent property from being used for the only purpose for which it was acquired and used. It is not unreasonable merely because it does not contain qualifications which seem reasonable to the judge.—*Slattery* v. *Naylor*, L.R. 13 App. Cas. 446; 59 L.T. 41; 36 W.R. 897.

(ii.) **Q. B. D.**—*Validity—Salmon Fishery Act*, 1873, *s.* 39, *sub-s.* 11.—A bye-law made by a board of conservators which is not a mere regulation but an absolute prohibition, for a definite time, of the use of certain nets which are not prejudicial to the salmon fishery, is *ultra vires.*—*Pidler* v. *Berry*, 59 L.T. 230.

Charity :—

(iii.) **Ch. D.**—*Charitable Trusts Act*, 1853, *s.* 28—*Summons.*—There is no jurisdiction to decide on a summons whether a charitable trust exists or not.—*In re Norwich Town Close Estate*, 36 W.R. 853.

(iv.) **Ch. D.**—*City of London Parochial Charities Act*, 1883, *ss.* 5, 10—*Charitable Trusts—Advowson.*—An advowson is not an exception to the general law as to charitable trusts. *Held*, that an advowson which was granted in 1589 to trustees for a parish, was "charitable property," and properly scheduled to a scheme of the Charity Commissioners.—*In re St. Stephen, Coleman Street; in re St. Mary, Aldermanbury*, 36 W.R. 837.

(v.) **C. A.**—*Reparation of Sea Dyke — Grant by Crown as Lord of a Manor to Copyholders.*—In the reign of Elizabeth, the Crown, as lord of a manor near the sea, in consideration of the copyholders undertaking the repair of a sea dyke which had been chargeable to the lord, granted to them "that they shall have the woods growing in W. Wood for and towards the reparation of" a particular part of the dyke. The sea having receded, *held*, that the grant of the wood constituted a charity or gift for charitable purposes; and a scheme was directed for the management and application of the trust property. — *Wilson* v. *Barnes*, L.R. 38 Ch. D. 507.

Colonial Law :—

(vi.) **P. C.—Canada.**—*Election Petition—Appeal.*—Whether the prerogative of the Crown has or has not been taken away by the general prohibition of appeals under the Canadian Controverted Elections Acts, it ought not to be exercised in the case of an appeal from a decision of the Supreme Court of Canada on an election petition, considering the narrow range of such cases, and the desirability of their being decided speedily and locally.—*Kennedy* v. *Purcell*, 59 L.T. 299.

(vii.) **P. C.—Natal.**—*Encroachment on Street—Private Act—Construction.*—A private Act enacted that "In all cases of encroachments of buildings on the streets, &c. (not dealt with by the Corporate Council, &c.) it shall be competent for the said council to have the same adjudicated under this law, as and when the said council may think fit." The Act created a "Board of Assessors," on which the Council was represented. *Held* (1) that the words "not dealt with," &c., meant "not already dealt with;" (2) that the jurisdiction of the Supreme Court was ousted; (3) that the Council, who were represented on the Board of Assessors, might be judges in their own case.—*Mayor of Pietermaritzburg* v. *Natal Land & Colonisation Co.*, L.R. 13 App. Cas. 478; 58 L.T. 895.

Company:—

(i.) **Ch. D.**—*Annual List of Members and Summary—Misleading Return—Metropolitan Police Magistrate—Companies Act*, 1862, *ss.* 26, 27, 44.—The forwarding to the Registrar of a list of members and summary which purport to satisfy the requirements of the Companies Act, is not sufficient unless the list and summary are in accordance with the facts. On a summons for penalties a Metropolitan police magistrate may enquire into the truth of the statements contained in such list and summary, though they are in accordance with the company's register. But questions of nicety as to the title to shares, and the right to be on the register, ought not to be determined on such a summons, and with reference to such questions the magistrate ought to treat the company's register as practically conclusive.—*In re Briton Medical and General Life Association*, L.R. 39 Ch.D. 61; 59 L.T. 134.

(ii.) **C. A.**—*Borrowing Powers—Ultra Vires—Improvement Loan—Land Improvement Company's Acts*, 1853, 1855, 1859—*Indorsed Receipt—Benefit of Charge.*—Decision of Ch. D. (*see* Vol. **13**, p. 35, i.) affirmed.—*Baroness Wenlock* v. *River Dee Co.*, L.R. 38 Ch.D. 534.

(iii.) **Ch. D.**—*Contributory—Infant—Acquiescence.*—Shares were placed in the name of an infant with his knowledge. He executed a transfer of them which the company refused to register. He stated to the secretary of the company that he should repudiate his shares on coming of age. For more than eighteen months after coming of age he took no steps to get rid of the shares. *Held*, on an application by him after the winding-up to be removed from the list of contributories, that by his acquiescence he had lost his right to repudiate the shares.—*In re Yeoland Consols*, 58 L.T. 922.

(iv.) **Ch. D.** — *Directors — Number — Quorum — Allotment—Validity.*—The articles of a company provided that there should not be less than three directors, and that two should be a quorum. Of three directors named in the prospectus, one had never consented to be and never was a director. Shares were allotted to X. by the other two. *Held*, after a winding-up order that the allotment was invalid, and that X. was entitled to be removed from the list of contributories.—*Re British Empire Match Co.*, 59 L.T. 291.

(v.) **Ch. D.**—*Return of Capital—Nominal Capital—Reduction—Companies Act*, 1867, *ss.* 9, 13.—A company passed a resolution that in respect of each of the shares on which £14 had been paid, £3 should be returned, upon the footing that the amount returned, or part of it, might be called up again as if it had never been paid up. The nominal capital was not altered by the proposed return. *Held*, that the Court might make an order confirming the resolution.—*In re Fore-street Warehouse Co.*, 59 L.T. 214.

(vi.) **Ch. D.**—*Share—Issue at Discount—Reduction of Capital.*—The issue of shares at a discount is illegal, though a contract providing for such issue is filed with the Registrar. Where a company, formed to purchase the business of an existing company, issued to the shareholders of such company, as purchase money, shares on each of which a sum of 15s. was credited as paid-up, a petition subsequently presented to reduce the capital by cancelling such sum of 15s. per share as having been lost, was dismissed.—*In re New Chile Gold Mining Co.*, L.R. 38 Ch. D. 475; 36 W.R. 909.

(vii.) **Ch. D.**—*Summons to Rectify Register—Attendance of Parties—Costs.*—On a summons to take the name of a contributory off the register, the Court refused to hear any party in opposition except the liquidator, or to grant costs to a creditor who opposed the summons.—*Re Anglo-Indian and Colonial Institution*, 59 L.T. 208.

(i.) **Ch. D.**—*Unregistered—Directors—Qualification Shares—Transfer—Validity—Companies Act*, 1862, *s.* 199.—A company was incorporated by Act of Parliament, eight persons being the first members. These persons were appointed directors, each holding qualification shares. After an action for penalties had been brought against the company five of the directors transferred their shares to a nominee. No other shares were subscribed for. *Held*, that the transfers were invalid, that there were still eight shareholders, and that a winding-up order could be made.—*In re South London Fish Market Co.*, 59 L.T. 210.

(ii.) **Ch. D.**—*Supervision Order—Security from Liquidator.*—In the case of a supervision order a creditor's representative, appointed to act as co-liquidator with a voluntary liquidator, was not required to give security, it appearing that no security had been required from the voluntary liquidator.—*In re Aberavon Tin Plate Co.*, 57 L.J. Ch. 761.

(iii.) **Ch. D.**—*Winding-up—Supervision Order.*—A petition was presented by a creditor for a compulsory winding-up. The debt being disputed, the petition stood over to enable the petitioner to establish it by action. The company then went into voluntary liquidation, and the liquidator admitted the debt. *Held*, that the Court was not bound to order a compulsory winding-up, and, with the assent of the company, made a supervision order, with the usual order as to costs, including the petitioner's costs of his action.—*In re New York Exchange Co.*, 58 L.T. 915.

(iv.) **Ch. D.**—*Winding-up—Voluntary—Provisional Liquidator—Rates—Priority—Companies Act*, 1862, *ss.* 87, 163.—A company went into voluntary liquidation, which was afterwards continued under supervision, *held*, that the fact that a provisional liquidator had been appointed prior to passing the liquidation resolution on a petition then pending, did not date back the commencement of the winding-up, so as to make the rates assessed between the appointment of the provisional liquidator and the passing of the resolution payable in full in priority to other debts.—*Re The Dry Docks Corporation of London*, 59 L.T. 295.

Conspiracy:—

(v.) **Q. B. D.**—*Trade Combination.*—Plaintiffs charged the defendants with unlawfully contriving and conspiring to prevent the plaintiffs carrying on their trade by forming themselves into a conference and offering a rebate on freights paid by those shippers who shipped their cargoes on board conference vessels only, to the exclusion of the plaintiffs' vessels. *Held*, that the combination was not unlawful; that the defendants were not guilty of a misdemeanour; and that the acts done in pursuance of the combination were not unlawful, malicious, or in restraint of trade.—*Mogul Steamship Co.* v. *McGregor*, 57 L.J. Q.B. 541.

Contempt of Court:—

(vi.) **C. A.**—*County Court—Sentence before Warrant—County Courts Act*, 1846, *s.* 113.—A warrant for committal of a person for contempt of Court by a County Court Judge, issued at the rising of the Court is regular, though the Judge orally sentenced him to pay a fine, with imprisonment in default, and the sentence was entered in the Registrar's book.—*Reg.* v. *Stafford Judge*, 57 L.J. Q.B. 483.

(vii.) **Q. B. D.**—*Imprisonment—Terms of Release.*—D. brought an action to recover houses which was dismissed. She attempted to take forcible possession, and was restrained by injunction from further molesting the owner or tenants of the houses. In December, 1886, she was imprisoned for breach of the injunction, and refused to undertake to comply

with it. In June, 1888, she was discharged, it being ordered; (1) that the injunction be made perpetual; (2) that a copy of the order be given to the owner of the premises with a view to his obtaining police assistance in case of an attempt to take possession by D.; (3) that in case D. should commit a further breach the official solicitor should take proper proceedings to enforce the order; (4) that D. should not issue any writ, or make any application against any person without leave; and if notice of any application should be given without leave, that the official solicitor should be informed, and that the respondent should not be required to appear without an order of Court.—*In re Maria Annie Davies*, L.R. 21 Q.B.D. 236.

Contract:—

(i.) **H. L.**—*Misrepresentation—Rescission—Consequential Relief.*—Decision of C. A. (*see* Vol. **12**, p. 60, viii.) affirmed; but without deciding whether an indemnity against the general liabilities of the firm should be part of the relief granted.—*Adam* v. *Newbigging*, L.R. 13 App. Cas. 308; 59 L.T. 267.

Costs:—

(ii.) **Q. B. D.**—*Arbitration—Reference by Consent—Costs of Negotiating Terms of Submission.*—Where in a reference to arbitration by consent, but not in a cause, the costs are left in the discretion of the arbitrator, the costs of negotiating and settling the terms of the submission may be allowed as "costs of the reference."—*In re Autothreptic Steam Boiler Co. and Townsend & Co.*, L.R. 21 Q.B.D. 182; 57 L.J. Q.B.D. 448.

County Court:—

(iii.) **P. D.**—*Admiralty Jurisdiction—Loading Agreement—County Courts Admiralty Jurisdiction Act*, 1869, *s.* 2.—An agreement between a colliery company and the charterers of a ship, whereby the company agree to load a ship within a certain time, and to pay demurrage if the time is exceeded, is not an "agreement made in relation to the use or hire" of a ship, so as to give the County Court jurisdiction to entertain a claim for demurrage.—*The Zeus*, 59 L T. 344.

(iv.) **Q. B. D.**—*Committal—"Open Court"—Debtors Act*, 1869, *s.* 5.—A county Judge sat for the purpose of hearing summonses for committal orders, and for all business except jury cases, in a small room which he used at other times as his private room; it communicated with a larger room, where was the jury box, by a door which was kept open during the hearing of the summonses; the names of the parties were, if necessary, called in the larger room, and the public had access to both rooms. *Held*, that the orders made for committal under these circumstances were not made in "open Court," and could not be enforced.—*Kenyon* v. *Eastwood*, 57 L.J. Q.B. 455.

(v.) **Q. B. D.**—*Commitment—Form of Order—Debtors Act*, 1869, *s.* 5—*County Court Rules*, 1886, *O.* xxv., *r.* 33—*Prohibition.*—On the hearing of a judgment summons the County Court Judge committed the defendant, but suspended the order. The only written document was a minute in the County Court books, which did not shew on its face the ground on which the order was issued. *Held*, that such minute was not the order within the meaning of the Debtors Act, and that as the order, if it were afterwards drawn up in accordance with the County Court Rules, would sufficiently comply with the Act, no prohibition should be granted.—*Harris* v. *Slater*, L.R. 21 Q.B.D. 359; 57 L.J. Q.B. 539.

See **Practice, p. 16, ii.**

Criminal Law :—

(i.) **Q. B. D.**—*Libel—Indictment—6 & 7 Vict., c. 96, ss. 4, 5.*—On an indictment for publishing a defamatory libel, "knowing the same to be false," the defendant may be convicted of merely publishing a defamatory libel. —*Boaler* v. *Reg.*, L.R. 21 Q.B.D. 284; 57 L.J. M.C. 85.

Crown Prerogative :—

(ii.) **Ch. D.**—*Distress—Priority.*—The prerogative right of the Crown to priority for its debts over those of a subject is not limited to proceedings by way of extent, but applies equally to proceedings by distress, although the distress put in by the subject is prior in date to that of the Crown, provided the distress put in by the subject has not been completely executed by actual sale. — *Attorney-General* v. *Leonard*, L.R. 38 Ch. D. 622; 57 L.J. Ch. 860.

See Bankruptcy, p. 2, vi.

Design :—

(iii.) **Ch. D.**—*Prior Publication—Patents, Designs, and Trade Marks Act, 1883, s. 51—Marking Goods.* —The plaintiff invented an article which he shewed to X., a commission agent, to obtain his opinion whether it would take. X. shewed it to S., a customer, who suggested alterations, and to other customers, who gave orders. The article was afterwards registered, and the orders were not executed till after registration. *Held*, that shewing the article to X. was not "prior publication;" but that shewing it to S. might amount, and shewing it to the other customers did amount to a "prior publication." The article, a trimming, was sold in packets surrounded with a paper band, having thereon "Rd." and the registered number of the pattern. *Held*, that it was properly marked.—*Blank* v. *Footman*, 36 W.R. 921.

Domicil :—

(iv.) **P. D.**—*Divorce—Jurisdiction.*—The petitioner in divorce proceedings was born in France, of French parents. When he was ten years old his parents settled in England, and his father was naturalized. At the age of eighteen he went to Canada. He bought a farm there, and in 1878 married a Canadian. In 1883 he brought her and their children to England, where he resided for some years with his father. He had occasion to return several times to Canada. He stated that he had never intended to settle permanently in Canada. *Held*, that he had acquired, and had not lost, an English domicil; that the matrimonial home was in England, and that the English Court had jurisdiction over the proceedings.—*D'Etchegoyen* v. *D'Etchegoyen*, L.R. 13 P.D. 132.

(v.) **P. C.**—*Personal Status—British Protected Subject.*—Domicil can only be acquired by connection with a locality; therefore the permanent residence of a testator at Cairo, where he acquired the status of a protected British subject, did not give him an English or Anglo-Egyptian domicile. —*Abd-ul-Messih* v. *Farra*, L.R. 13 App. Cas. 431; 59 L.T. 106.

Easement :—

(vi.) **H. L.**—*Grant—Extinguishment—Merger.*—Decision of C.A. (*see* Vol. 12, p. 8, i.), affirmed.—*Dynevor* v. *Tenant*, L.R. 13 App. Cas. 279; 59 L.T. 5.

Ecclesiastical Law:—

(i.) **Q. B. D.**—*Curate's Stipend—Jurisdiction of High Court*—1 & 2 *Vict.*, c. 106, *ss.* 81 & 83.—The defendant agreed to employ the plaintiff as his curate at an annual stipend, and to provide him with board and lodging. The terms were set out in the nomination of the curate to the bishop. Differences arose as to the board and lodging, and the plaintiff brought an action for damages in lieu of board and lodging. *Held*, that the action would lie, and that the High Court had jurisdiction to try it, the difference not being one exclusively reserved for the bishop.—*Fraser* v. *Denison*, 57 L.J. Q.B. 550.

(ii.) **Consistory Court of London.**—*Curate—Notice to Quit.*—A notice by an incumbent to a curate to quit his curacy, given under 1 & 2 Vict. c. 106, s. 95, is not a notice within, or subject to the regulations of, s. 112 of the same Act.—*Tanner* v. *Scrivener*, L.R. 13 P.D. 128.

Executor:—

(iii.) **Ch. D.**—*Devastavit—Statute of Limitations—Rents—Mortgage—Assets—Specialty*—3 & 4 *Will. IV.*, *c.* 104.—Testator mortgaged freeholds and died in 1867, having devised all his real and personal estate to A. and B. on trusts, and having appointed them his executors. A. and B. applied all the personalty in payments to simple contract creditors and beneficiaries, without providing for the mortgage debt. In 1869, A died, and C. was appointed trustee in his place in 1871. The rents of the real estate were applied in paying the interest on the mortgage, and the balance on the trusts of the will. The mortgaged estate proved insufficient, and the interest fell into arrear. The mortgagees sued B. and C., and accounts were directed of the personal estate received by A. and B., or by B. alone, and also the usual accounts of real estate, including an account of rents and profits against B. and C. *Held*, that B. could not set up his and A.'s wrongful payments by way of devastavit to claim the benefit of the Statute of Limitations, and that he was liable for the personal estate paid to simple contract creditors and beneficiaries. *Held*, also, that the rents and profits were assets by accretion liable for payment of specialty creditors like the real estate.—*Bowles* v. *Hyatt*, L.R. 38 Ch. 609; 37 L.J. Ch. 777; 59 L.T. 297.

Extradition:—

(iv.) **Q. B. D.**—*United States Government—Trial for Offence other than the Crime Proved on Surrender.*—On the committal of a fugitive criminal on charges of forgery alleged to have been committed in New York, it was suggested that the prisoner might be tried for some charge other than those in respect of which she had been surrendered. *Held*, that the Government of the United States had made provision that a fugitive criminal should only be tried for the offence in respect of which he had been surrendered; and further, that the point had been so decided by the Supreme Court of the United States. A rule *nisi* for *habeas corpus* was therefore discharged.—*In re Alice Woodall*, 57 L.J. M.C. 72.

False Imprisonment:—

(v.) **C. A.**—*Warrant of Commitment—Protection to Governor of Prison.*—An action will not lie against the governor of a prison for detention of a prisoner in pursuance of the terms of a warrant valid on the face of it. Plaintiff being sentenced to seven days' imprisonment, a warrant of commitment was issued directing that he should be imprisoned in M. gaol for seven days. He was arrested on August 24, and lodged in

prison on August 25. The governor detained him until and during August 31. *Held*, that whether the sentence ran from August 24 or August 25, the governor was justified by the warrant in detaining the plaintiff on August 31.—*Henderson* v. *Preston*, L.R. 21 Q.B.D. 362; 36 W.R. 834; 59 L.T. 334.

Husband and Wife :—

(i.) **C. A.**—*Divorce—Both Parties Guilty of Adultery—Husband Guilty of Cruelty—Wife's Costs—Matrimonial Causes Act*, 1857, *ss.* 7, 16, 17, 22, 31—*Married Women's Property Act*, 1882.—Where both parties were guilty of adultery, and the husband was guilty of cruelty, *held*, reversing the decision of P.D. (*see* Vol. 13, p. 41, vii.) that a decree of judicial separation could not be granted on the wife's petition. The husband is ordered as a general rule to pay the wife's costs in a suit for dissolution, either incurred in defending herself or attempting to substantiate charges against him, and also the costs reasonably incurred by her in defending an appeal (even if successful) brought by the husband. *Quære*, whether this rule applies in case of a woman married after the Married Women's Property Act, 1882.—*Otway* v. *Otway*, 57 L.J. P. 81; 59 L.T. 153.

(ii.) **P. D.**—*Judicial Separation—Maintenance—Securing on Husband's Property—Repugnant Condition in Will of Husband's Testator.*—The question being whether a husband had property on which permanent maintenance could be secured, it appeared that he had freehold property under a testamentary document, which contained a provision for forfeiture in case he should charge, incumber, or part with it. *Held*, that the provision was repugnant and void, and that the respondent had an estate in fee.—*Corbett* v. *Corbett*, L.R. 13 P.D. 136; 59 L.T. 183.

(iii.) **P. D.**—*Judicial Separation—Separate Property—Ownership Disputed—Reference to Registrar—Married Women's Property Act*, 1882, *s.* 17.—A wife having obtained a decree of judicial separation, moved for an order to her husband to deliver up furniture, which she alleged was her separate property. The ownership being disputed, the motion was ordered to stand over, and the question of ownership was referred to the registrar.—*Phillips* v. *Phillips*, 59 L.T. 183; 57 L.J. P. 76.

(iv.) **H. L.**—*Post-Nuptial Settlement by Husband—Wife's Assent—Jus Relictæ.*—By a post-nuptial settlement a husband directed his trustees to pay his wife the whole income of his estates, and by the "fourth purpose" directed them to convert his estate into money after the death of the survivor and "with her consent and full approbation (in token of which she has subscribed this deed) to pay" certain legacies. There was no express discharge of the wife's terce or *jus relictæ*. The wife signed the deed. She survived her husband a short time, during which she could not do any business. *Held*, that the wife must have been taken to have accepted the provision made for her, and that though she could have revoked her consent, her representatives could not do so, and could not claim her terce and *jus relictæ*.—*Edward* v. *Cheyne*, L.R. 13 App. Cas. 373.

(v.) **H. L.**—*Separate Estate—Receipt of Income by Husband—Presumption of Gift.*—A married woman may make an effectual gift of the income of her separate estate to her husband; but by the Scotch law she may revoke the gift, even after her husband's death, and may reclaim the subject of gift if it has not been consumed. The income of a married woman's separate estate was paid to her husband's banking account, he being sole trustee for her, and mixed with his moneys. *Held*, that a gift

was implied, and that as it had not been revoked by the wife, her representatives could not claim an account against the husband of his dealings with her separate estate.—*Edward* v. *Cheyne*, L.R. 13 App. Cas. 385.

Infant:—

(i.) **Ch. D.**—*Religious Education—Guardianship of Infants Act*, 1886.—The right of a father to direct in what religion his children shall be brought up after his death is not affected by the Guardianship of Infants Act.—*In re Scanlan*, 57 L.J. Ch. 718; 36 W.R. 842.

Justices:—

(ii.) **Q. B. D.**—*Jurisdiction—Claim of Right—Obstruction to Highway.*—A shopkeeper was summoned for obstructing the footpath of a street by placing goods outside. He contended that he *bonâ fide* claimed the right to do so. *Held*, that the Justices ought to determine whether the land on which the goods were placed was part of the public highway or not, that no question of title was involved, and that their jurisdiction was not ousted.—*Leicester Sanitary Authority* v. *Holland*, 57 L.J. M C. 75.

(iii.) **Q. B. D.**—*Refusal to Issue Summons—Rule against Justice*—11 *&* 12 *Vict.*, c. 44, s. 5—*Trafalgar Square—Right of Meeting.*—Where a justice of the peace has refused to issue a summons, on the ground that the information does not disclose an indictable offence, the High Court cannot review his decision either as to law or fact, and therefore will not grant a rule calling on the justice to shew cause why he should not hear and determine the summons. *Semble*, there is no right on the part of the public to hold meetings in Trafalgar Square, and the Commissioners of Works may prohibit such meetings.—*E. p. Lewis*, L.R. 21 Q.B.D. 191; 59 L.T. 338.

Landlord and Tenant:—

(iv.) **H. L.**—*Covenant to Repair—Indemnity against Covenant—Bankruptcy.*—Decision of C. A. (*see* Vol. 12, p. 102, ii.) affirmed.—*Hardy* v. *Fothergill*, L.R. 13 App. Cas. 351; 59 L.T. 273.

(v.) **Q. B. D.**—*Weekly Tenancy—Dangerous Premises—Liability.*—A weekly tenancy is a reletting of the premises at the beginning of each week. The plaintiff was injured in consequence of the dangerous condition of premises, of which the defendant was owner, and which were let on a weekly tenancy. *Held*, that the defendant would be liable if the premises were in a dangerous condition at the beginning of the week in which the plaintiff was injured.—*Sandford* v. *Clarke*, L.R. 21 Q.B.D. 398; 57 L.J. Q.B. 507; 59 L.T. 226.

Libel.—*See* Practice, p. 16, iii., v.; p. 17, iv.

Licensing:—

(vi.) **Q. B. D.**—*Renewal—Forfeiture of Old License—Discretion of Justices—Wine and Beerhouse Act*, 1869, *ss.* 8, 19.—A license existing in May, 1869, for the sale of beer to be consumed on the premises, was forfeited by the conviction of the holder for allowing the premises to be used as a brothel. *Held*, that the license was not "in force," and that the licensing justices, at special sessions, had a general discretion to refuse applications by the landlord and a new tenant for a transfer of the license.—*Reg.* v. *Justices of the West Riding*, L.R. 21 Q.B.D. 258; 57 L.J. M.C. 103; 36 W.R. 855.

Lunatic :—

(i.) **Q. B. D.**—*Person of Unsound Mind not so Found—Action to Recover Real Estate—Next Friend—Stay of Action as not Beneficial.*—An action to recover real estate may be brought by the next friend of a person of unsound mind not so found by inquisition, but the Court will stay the action if of opinion that it is not beneficial to the lunatic.—*Waterhouse* v. *Worsnop*, 59 L.T. 140.

Married Woman :—

(ii.) **Ch. D.**—*Settlement on Former Marriage—Interest of Wife—Married Women's Property Act*, 1882, *ss.* 2, 19.—Under a settlement, dated 1878, the trusts, in the event (which happened) of the wife's surviving, and there being no issue, were for such person as the wife should during coverture by will, and when not under coverture by deed or will appoint, and in default of appointment for her, her executors, &c. She married a second time in 1887. She had not made any appointment while a widow. *Held*, that whatever she took under the settlement was her separate estate, and that she was entitled to have the trust funds paid over to her.—*Plowden* v. *Gayford*, 59 L.T. 308; 36 W.R. 883.

Master and Servant :—

(iii.) **C. A.**—*Dangerous Machine—Defect in Condition—Employers' Liability Act*, 1880, *s.* 1, *sub-s.* 1, *s.* 2, *sub-s.* 1.—The defects in the condition of machinery for which an employer is liable, are defects implying negligence on the part of the employer, or of some one entrusted by him with the duty of seeing that the machinery is in proper condition; therefore, the mere fact that a machine is dangerous to the workmen employed to work it does not shew that there is such a defect.—*Walsh* v. *Whiteley*, L.R. 21 Q.B.D. 371; 36 W.R. 876.

(iv.) **C. A.**—*Negligence of Fellow-Workman—Superintendence—Foreman of Gang—Employers' Liability Act*, 1880, *s.* 1, *sub-ss.* 2, 3, *s.* 8.—Decision of Q. B. D. (*see* Vol. 13, p. 45, iv.) affirmed.—*Kellard* v. *Rooke*, L.R. 21 Q.B.D. 367; 36 W.R. 875.

Mortgage :—

(v.) **Ch. D.**—*Mortgagee in Possession—Account—Public-house—Lease—Profit from Sale of Beer.*—The mortgagees of a public-house took possession, and after carrying on the business themselves, leased it to tenants, with a clause binding them to take all their beer from the mortgagees. *Held*, in an action by the mortgagors for an account, after a sale by the mortgagees, that the mortgagees were not entitled to interest on the cost of beer supplied while they carried on the business; that they were not bound to account for the profits derived from the sale of beer to the tenants; but that they ought to be charged with the increased rent which they might have obtained for the house as a free house.—*White* v. *City of London Brewery Co.*, 36 W.R. 881.

(vi.) **Ch. D.**—*Redemption Action—Reconveyance.*—A mortgagee is not obliged to reconvey until he is paid off, though sufficient money has been paid into Court to secure him.—*Lacey* v. *Waghorne*, 59 L.T. 208.

(vii.) **Ch. D.**—*Tacking—Purchaser for Value without Notice—Trustee for Mortgagor.*—A mortgagor made successive mortgages. The first mortgagee received no notice of the second mortgage, and the third mortgagee had no notice of the second mortgage at the date of his advance. The mortgagor conveyed to P., on trust, to sell and pay mortgages, the residue of the purchase money to be in trust for the mortgagor. P., out of his own money, paid off the first and third

mortgages, took transfers of them to himself, and got in the legal estate. He then claimed to tack the third to the first, so as to have priority over the second. *Held*, that as trustee for the mortgagor, he must be held to be acting on his behalf, and could not destroy the rights of the mortgagees any more than the mortgagor himself could.—*Ledbrook* v. *Passman*, 57 L.J. Ch. 855; 59 L.T. 306.

Municipal Election:—

(i.) **Q. B. D.**—*Nomination Papers—Subscription of Assenting Burgess—Municipal Corporations Act*, 1882.—An assentor to the nomination of X. signed his name Edwin J. H. In the ward-roll he was described as Edwin John H. *Held*, that the subscription was sufficient.—*Bowden* v. *Besley*, L.R. 21 Q.B.D. 309; 57 L.J. Q.B. 473; 59 L.T. 219; 36 W.R. 889.

Negligence:—

(ii.) **Q. B. D.**—*Nuisance—Property adjoining Highway—Wrongful Act of Stranger—Duty of Owner.*—When property adjoining a highway becomes, through the wrongful acts of strangers, a nuisance to the public lawfully using the highway, the owner of the property is bound, on becoming aware of the facts, to abate the nuisance.—*Silverton* v. *Marriott* 59 L.T. 60.

(iii.) **Q. B. D.**—*Volenti non fit Injuria.*—To enable the defendant to succeed on the ground of "*volenti non fit injuria,*" he must obtain a finding of fact that the plaintiff freely and voluntarily, and with full knowledge of the nature and extent of the risk, implicitly agreed to incur such risk, and the onus of proof lies on the defendant to establish that the maxim applies.—*Osborne* v. *L. & N. W. R.*, L.R. 21 Q.B.D. 220; 59 L.T. 227.

(iv.) **Ch. D.**—*Valuation for Purpose of Mortgage—Duty of Valuer.*—A valuer was instructed by a proposed mortgagor, at the request of the proposed mortgagee, to value the intended security. It appeared that the valuer knew that the valuation was for the purpose of an advance, and that the valuation as made was in fact no valuation at all. Loss having resulted to the mortgagee, *held*, that the valuer was liable, because (1) he owed the mortgagee (independently of contract) a duty which he had failed to discharge; and (2) he had made reckless statements on which the mortgagee had acted.—*Cann* v. *Willson*, L.R. 39 Ch. D. 39.

Obstruction:—

(v.) **Q. B. D.**—*Walking on Footpath and Turning Persons Off—Towns' Police Clauses Act*, 1847, *s.* 28.—Where three persons walked abreast up and down the footpath of a street, and thereby caused several persons to leave the footpath, *held*, that they could not be convicted for obstructing the street.—*Reg.* v. *Long*, 59 L.T. 33.

Patent:—

(vi.) **C. A.**—*Anticipation—Infringement—Shorthand Notes—Costs.*—Decision of Ch. D. (*see* Vol. 13, 80, iv.) reversed. *Held*, that either the defendant's patent had anticipated the plaintiff's patent, or that if there was anything in the plaintiff's patent which was not in the defendant's, there was no infringement. Shorthand notes taken by a clerk of a solicitor in the cause cannot be referred to. Costs on the higher scale should be allowed in patent cases where scientific witnesses are necessarily called.—*Ellington* v. *Clark*, 58 L.T. 818.

(i.) **H. L.**—*Infringement—Damages.*—The fact that the plaintiff in an action for infringemant has, in consequence of the unlawful competition of the defendant, the infringer, reduced the price at which he sold his goods, does not entitle him to damages in respect of the consequent reduction of profit. The fact that the defendant might, without infringing the patent, have sold as large an amount of the goods in question as he did actually sell is no ground for giving nominal damages. The plaintiff is entitled to damages to the extent to which his trade was injured by the defendant's sales; the measure of damages being the profit which he would have made if he had effected such sales himself, deducting a fair percentage in respect of sales due to the particular exertions of the defendant.—*United Horse-Shoe Company* v. *Stewart*, L.R. 13 App. Cas. 401.

Poor Law:—

(ii.) **Q. B. D.**—*Employment of Solicitor by Guardians—Taxation of Clerk of Peace—Poor Law Amendment Act*, 1844, *ss.* 32, 35, 39.—When a solicitor is employed by the Guardians, the taxation of his bill by the clerk of the peace is not final and conclusive against him, but he is entitled to an order for taxation under the Solicitors Act, 1843.—*Southampton Guardians* v. *Bell and Tayler*, L.R. 21 Q.B.D. 297; 59 L.T. 181; 36 W.R. 924.

(iii.) **C. A.**—*Settlement—Residence—Widow—Divided Parishes Act*, 1876, *s.* 34.—Decision of Q. B. D. (*see* Vol. **13**, p. 48, i.) affirmed.—*Medway Guardians* v. *Bedminster Guardians*, L.R. 21 Q.B.D. 278; 36 W.R. 851.

Practice:—

(iv.) **Q. B. D.**—*Annuity Bond—Claim for Principal Sum or Penalty—Final Judgment—8 & 9 Will. III.*, *c.* 11, *s.* 8—*R.S.C.*, 1883, *O.* III., *r.* 6; *O.* xiii., *r.* 14—*O.* xiv., *r.* 14.—Final judgment cannot be signed under Order xiv. on a writ indorsed with a claim on a bond within 8 & 9 Will. III., c. 11. A writ was indorsed "for principal on the defendant's bond, conditioned for the payment to the plaintiff of £26 in every year until, etc., by equal quarterly payments, and two such quarterly payments are due and unpaid. Particulars: Principal, £500; and the plaintiff claims £500." *Held*, not to be a special indorsement, and that judgment could not be signed under Order xiv.—*Tuther* v. *Caralampi*, 59 L.T. 141.

(v.) **H. L.**—*Appeal in Formâ Pauperis—Alleged Public Right.*—Leave to appeal in *formâ pauperis* refused where it appeared that the appellant sought as one of the public to assert a right of fishing, and that subscriptions had been collected to assist him in the litigation.—*Bowie* v. *Marquis of Ailsa*, L.R. 13 App. Cas. 371.

(vi.) **Q. B. D.**—*Charging Order—R.S.C.* 1883, *O.* xlvi., *rr.* 1, 3—1 *& 2 Vict.*, *c.* 110, *s.* 14—3 *& 4 Vict.*, *c.* 82, *s.* 1.—A charging order may be made on cash standing to the credit of the judgment debtor in the name of the Paymaster General.—*Brereton* v. *Edwards*, L.R. 21 Q.B.D. 226; 59 L.T. 336.

(vii.) **Q. B. D.**—*Costs—Counter-Claim against Third Party—Trial without Jury—Discretion of Judge—R.S.C.*, 1883, *O.* xxi., *rr.* 11, 12, 13, 14; *O.* lxv., *r.* 1—*County Courts Act*, 1867, *s.* 5.—On a trial by a judge, without a jury, of an action where there was a counter-claim against the plaintiff and a third party, the judge gave judgment for the defendant against the third party, "with such costs as the defendant

would be entitled to by law." *Held*, that the costs were in the discretion of the judge, and the defendant was therefore not "entitled by law" to any costs. *Semble*, where the counter-claim is against a third party sec. 5 of the County Courts Act, 1867, is not applicable.—*Lewin* v. *Trimming*, L.R. 21 Q.B.D. 230.

(i.) **Q. B. D.**—*Discovery—Inspection of Documents—Refusal on Ground of Public Interest.*—The plaintiff, in an action for libel, in his affidavit of documents, mentioned copies of communications between himself, as Governor of a Colony, and the Secretary of State, and stated that he had been directed by the Secretary of State to object to their production on the ground of the interests of the public service. *Held*, that a motion by the defendant for liberty to inspect the documents must be refused. —*Henessy* v. *Wright*, 57 L.J. Q.B. 530; 59 L.T. 323.

(ii.) **Q. B. D.**—*Imprisonment for Debt—County Court—Expiration of Committal Order—Second Order.*—When a committal order has been made by a County Court Judge against a defaulting judgment debtor, and the order, not having been put in force, expires a year after its date according to the County Court Rules, the judge can make a second order, the debtor still being in default.—*Reg.* v. *Stonor*, 57 L.J. Q.B. 510.

(iii.) **C. A.**—*Interrogatories—Libel Action against Newspaper—Disclosure of Name of Correspondent and Original Manuscript.*—In an action against a newspaper for a libel contained in a letter from a correspondent and an article thereon, the defence was that the alleged libel consisted of an accurate report of public proceedings and fair comment thereon. *Held*, that the plaintiff could not interrogate the defendant as to the names of the persons on whose information the reports were based, or the name of the correspondent, or the original manuscript of the letter.—*Henessy* v. *Wright*, 36 W.R. 879.

(iv.) **C. A.**—*Particulars.*—Action to restrain trespass on a road. Defence that the road had been used as of right by the public as a highway, having been dedicated to the public by the plaintiff or his predecessors. *Order*, that if the defendants relied on any specific acts of dedication, or declarations of intention to dedicate, whether alone or jointly with evidence of user, they should set forth the nature and dates of those acts or declarations, and the names of the persons by whom they were done or made. *Held*, that the defendants ought not to be required to set forth "the nature of all acts of dedication relied on, and if they claimed by acts of dedication other than permissive user, the particulars of such acts."—*Spedding* v. *Fitzpatrick*, L.R. 38 Ch.D. 410.

(v.) **C. A.**—*Particulars—Libel.*—The defendant published articles alleging that the plaintiff, who was Governor of Mauritius, had been charged by members of the council of the colony, with sending to the Colonial Office garbled reports of their speeches; the plaintiff also alleged that the defendant's articles imputed to him that he had in fact sent such garbled reports. To an action for libel the defendant pleaded that the alleged libels were true in substance and in fact. *Held*, that the defendant must give further and better particulars, it not being clear whether the defence meant that what was charged against the defendant was truly reported, or that what was reported to have been charged was in fact true.—*Henessy* v. *Wright*, 36 W.R. 878.

(vi.) **Ch. D.**—*Particulars—Trade Mark—Names of Persons Deceived.*—In an action to restrain infringement of a trade-mark, the plaintiff alleged that "divers persons" had been induced to purchase the defendant's goods as the plaintiff's. *Held*, that he ought to give the names of the persons so induced to purchase.—*Humphries* v. *Taylor Drug Co.*, 59 L.T. 177.

(i.) **C. A.**—*Payment into Court—Tender in Part Satisfaction—Denial of Total Liability—Payment Out—Order Necessary—R.S.C.*, 1883, *O.* xxii., *rr.* 5 (*c*), 6 (*c*).—Decision of Q. B. D. (*see* Vol. 13, p. 86, iv.) reversed. *Held*, that the money ought not to have been taken out, but that, under the circumstances, the solicitor ought not to be ordered to refund it.—*Davys* v. *Richardson*, L.R. 21 Q.B.D. 202; 57 L.J. Q.B. 409.

(ii.) **Q. B. D.**—*Payment into Court—Apportionment to Different Heads of Claim—R.S.C.*, 1883, *O.* xix., *r.* 7; *O.* xxii., *r.* 2.—Where to a statement of claim, claiming damages under three different heads, the defendant pleaded a general denial of liability, and paid a sum into Court as sufficient to satisfy the plaintiff's claim; *held*, that he ought to give particulars apportioning the sum paid in to the different heads of the claim.—*Rowe* v. *Kelly*, 59 L.T. 139.

(iii.) **Ch. D.**—*Payment Out—Fund Exceeding £1,000—Petition or Summons—R.S.C.*, 1883; *O.* lv., *r.* 2, *sub-r.* 1.—Where the title to a fund in Court depends only on the proof of the identity or birth of any person, the mere fact that the fund exceeds £1,000 is not sufficient to justify an application for payment out being made by petition.—*Bates* v. *Moore*, 57 L.J. Ch. 789.

(iv.) **Q. B. D.**—*Pleading—Libel—Justification—Plea Going to Damages—R.S.C.*, 1883, *O.* xix., *r.* 4; *O.* xxi., *r.* 4.—In an action for libel where the defendant pleads justification, he cannot insert in his defence a paragraph setting up the plaintiff's general bad reputation at the date of the publication of the libel, as that is a plea going to damages only.—*Wood* v. *Earl of Durham*, 57 L.J. Q.B. 547; 59 L.T. 142.

(v.) **C. A.**—*Service Out of Jurisdiction—"Proper" Parties—R.S.C.*, 1883, *O.* xi., *r.* 1 (*g*).—In an action for breach of warranty of authority against defendants in England, it appeared that they had assumed as agents for foreign principals to enter into a contract to be performed out of the jurisdiction, and that the supposed principals had repudiated the contract as having been made without authority. *Held*, that the foreign principals were "proper parties," and that service on them out of the jurisdiction of notice of the writ might be allowed.—*Massey* v. *Heynes*, L.R. 21 Q.B.D. 330; 57 L.J. Q.B. 521; 36 W.R. 834.

(vi.) **Ch. D.**—*Service—Company out of Jurisdiction, with Branch Works in England—Companies Act*, 1862, *s.* 62—*R.S.C.*, 1883, *O.* ix., *r.* 9.—The defendant company had their registered office in Scotland, but had branch works in England. The writ was served on the manager of the branch works, and a copy was sent by post to the registered office. *Held*, that the service was bad.—*Wood* v. *Anderston Foundry Co.*, 36 W.R. 918.

(vii.) **C. A.**—*Irregular Service—Waiver of Objection—Application to Discharge Order—R.S.C.*, 1883, *O.* lxiii., *r.* 12; *O.* lxx., *r.* 2.—An order was made by the Vacation Judge on an *ex parte* application by the plaintiff, for substituted service of the writ on the defendant, a foreigner residing out of the jurisdiction. *Held*, that the defendant by opposing a motion in the action had waived all objections to the irregularity of the order. Though the *ex parte* order had been passed and entered the defendant might move to discharge it, his proper course being to apply to the Judge to whose Court the action was assigned to discharge the vacation order.—*Boyle* v. *Sacker*, 58 L.T. 822.

(viii.) **Ch. D.**—*Winding-up—Service of Notice out of Jurisdiction—R.S.C.*, 1883, *O.* xi, *r.* 1.—On the close of a liquidation a dividend on a claim made in the names of S. and P. was paid into Court. S. claimed to be

entitled to the whole, and took out a summons for payment to him. *Held*, that the summons might be served on P., who was resident out of the jurisdiction.—*Re Baron Liebig's Cocoa Works*, 59 L.T. 315.

(i.) **Ch. D.**—*Writ of Assistance—Delivery of Chattels—R.S.C.*, 1883, *O.* xlvii., *r.* 2; *O.* xlviii.—The old chancery remedy by way of writ of assistance is still available in cases not met by Order xlviii.; *e.g.*, where chattels such as documents are in peril, and a receiver appointed by the Court is unable to serve the respondent or obtain possession, the respondent having absconded, and his clerks declining to give up the documents.—*Wyman* v. *Knight*, 59 L.T. 164.

Railway :—

(ii.) **Q. B. D.**—*Action for Charges for Carriage—Undue Preference—Unreasonable—Railway and Canal Traffic Act*, 1854, *ss.* 2, 6.—In an action by a railway company for charges for carriage of goods it is no defence that the charges sued for are unreasonable, so as give undue preference to other persons, or to subject the defendant to undue prejudice or disadvantage, nor can the defendant set off, or recover by counter-claim, over payments in respect of previous unreasonable charges.—*L. & Y. R.* v. *Greenwood*, L.R. 21 Q.B.D. 215.

(iii.) **Q. B. D.**—*Negligence—Forwarding Goods—Reasonable Facilities.*—In an action for non-delivery of goods within a reasonable time, it was proved that the goods arrived one minute after the advertised time of the train's departure. The train was eight minutes late in starting, but the porters were unable to weigh and book the goods in time for it. They were sent by a later train. *Held*, that there had been no want of reasonable facilities for forwarding the goods, and that the company was not liable.—*Nicholls* v. *N.E.R.*, 59 L.T. 137.

(iv.) **C. A.**—*Receiver and Manager—Construction, Maintaining, or Working Railway—Railway Companies Act*, 1867, *ss.* 3, 4.—Decision of Ch. D. (*see* Vol. **13**, p. 132, iv.) affirmed.—*Clark* v. *East & West India Dock Co.*, L.R. 38 Ch. D. 576; 59 L.T. 230; 36 W.R. 849.

Restraint of Trade :—

(v.) **Ch. D.**—"*Any Engagement*"—"*Any Business.*"—A foreman tailor covenanted that he would not " enter into any engagement, or be concerned or interested in carrying on any business" within certain limits. *Held*, that the restraint was unreasonable, and that the covenant was not divisible, and could not be enforced. — *Baker* v. *Hedgecock*, 36 W.R. 840.

Revenue :—

(vi.) **Q. B. D.**—*Customs and Inland Revenue Act*, 1885, *s.* 11, *sub-ss.* 3, 6, 7 —*Duty on Property of Bodies Corporate or Unincorporate—Exemptions.*—An institution was founded for the benefit of members of certain trades. Members and their families were entitled to benefits by way of annuities, sick allowances, or grants of aid, the benefits being given at the discretion of the board of directors. The property of the institution consisted of the accumulated subscriptions of members, of donations, and of bequests. *Held*, that the institution was not charitable, but of the nature of a mutual benefit society; and that the portion of its funds derived from the subscriptions of members was not exempt from duty, but that the portion derived during thirty years from donations, and from property acquired during that period on which legacy duty had been paid was exempt if it could be ascertained.—*In re the Linen and Woollen Drapers' Institution*, 58 L.T. 949.

(i.) **H. L.**—*Income-Tax—Deduction from Profits—Bank Premises Occupied by Manager—5 & 6 Vict, c. 35, s. 100, Sched. D, r. 1 of Cases II. & III.*—Where part of the premises of a bank were used as a dwelling-house by the manager, *held*, that the bank was entitled to deduct from their profits before returning them for assessment the annual value of the whole of the bank premises.—*Russell* v. *Town and County Bank*, L.R. 13 App. Cas. 418.

(ii.) **Q. B. D.**—*Income-Tax—Investments Made in Carrying on Business—Income-Tax Act, 1842, ss. 102, 163.—Income-Tax Act, 1853, s. 2, Schedules C & D.*—The amount of interest received by an insurance company from investments made for the purpose of carrying on their business on which income-tax had been deducted at its source amounted to more than the profits of the company for the year of assessment, but the company had during the year received interest from investments on which income-tax had not been deducted at its source. *Held*, that the company were liable to pay income-tax on such last-named interest.—*Clerical, Medical, and General Life Assurance Society* v. *Carter*, L.R. 21 Q.B.D. 339.

(iii.) **Q. B. D.**—*Income Tax—County Lunatic Asylum—Medical Officer's Apartments—5 & 6 Vict., c. 35—16 & 17 Vict., c. 34, Sched. A—Lunatic Asylums Act, 1853.*—The justices of a county are properly assessed to income-tax in respect of such parts of a county lunatic asylum as are occupied as apartments by the medical officers and steward, and in respect of a separate house occupied by the chaplain.—*Bray* v. *Lancaster Justices*, 57 L.J. M.C. 57.

(iv.) **C. A.**—*Stamp Duty—33 & 34 Vict., c. 97, s. 49 and Schedules—Agreement or Promissory Note.*—Decision of Q. B. D. (*see* Vol. **13**, p. 90, vii.) affirmed.—*Mortgage Insurance Corporation* v. *Commissioners of Inland Revenue*, L.R. 21 Q.B.D. 352; 36 W.R. 833.

Settled Land:—

(v.) **Ch. D.**—*Chattels—Proposed Sale—Settled Land Act, 1882, ss. 37, 53.*—An application for leave to sell settled chattels, being opposed by the trustees and remainderman, was refused, regard being had to the amount of the tenant for life's income, and to the fact that the settlor of the chattles had knowledge of the position of the estate.—*Re Beaumont's Settled Estate*, 58 L.T. 916.

(vi.) **C. A.**—*Trust for Sale—Exercise Deferred—Discretionary Power of Maintenance—Tenant for Life—Settled Land Act, 1882, s. 63.*—Devise of land on trust for sale, the sale not to be made until twenty-one years after the date of the will; the rents until sale to be applied in the same manner as the income of the proceeds. Gift of the income to testator's widow for life; after her death the fund to be held in trust for his children, who, being sons, should attain twenty-five; or, being daughters, attain that age or marry under it. There was a power to apply any part of the income of the share to which any child might be entitled in expectancy for maintenance, the surplus to be accumulated in augmentation of his share. The testator survived his wife, and left children under twenty-five. *Held*, that even if there was a trust for sale (as to which *quære*), the children were not together entitled to the beneficial income of the land so as to be deemed tenant for life thereof.—*In re Horne's Settled Estate*, 57 L.J. Ch. 790.

Settlement:—

(vii.) **H. L.**—*Construction—Children—Appointment.*—By marriage settlement lands were settled on trust for A. for life, and from and after his death for all and every or any one or more child or children, or any grand-

child or grandchildren or other issue then in being of the intended marriage as A. should appoint. A. appointed to B., a son of the marriage, who died in A.'s lifetime. *Held*, that the words "then in being" applied only to grandchildren or remoter issue, and that the appointment was good.—*Leader* v. *Duffy*, L.R. 13 App. Cas. 294; 59 L.T. 9.

Ship:—

(i.) **P. D.**—*Cargoes—Two-deck Ship—Shifting-boards—Feeders—Merchant Shipping Act*, 1880, *s.* 4, *sub-s.* (*c*)—*Board of Trade Regulations, August*, 1881.—A two-decked ship loaded with grain in bulk in the Mediterranean must have shifting-boards in the lower hold. The feeders which feed the grain carried in the between-decks must contain not less than two per cent. of the grain carried in the compartment which they feed, and of the grain in the hold below which is fed by such compartments.—*The Rothbury*, L.R. 13 P.D. 119.

(ii.) **P. D.**—*Collision—Fog—Steam-whistle.*—When an officer in charge of a steamship in a fog hears a steam-whistle, but cannot be sure of its bearing, and does not know the heading of the vessel sounding it, he must diminish speed to the utmost, and only keep steerage way. The fact that a steam-whistle in a fog is not heard by an approaching ship is not necessarily proof of a bad look-out. — *The Rosetta*, 59 L.T. 342.

(iii.) **C. A.**—*Collision—Risk of—Regulations for Preventing Collisions at Sea, Arts.* 18, 22, 23.—Where two steamships are approaching so as to involve risk of collision, and it is the duty of one to keep out of the way and of the other to keep her course, the latter is bound to slacken speed, stop, or reverse, in accordance with Article 18, although to continue her speed may be the best and most seamanlike course for the purpose of avoiding collision.—*The Memnon*, 59 L.T. 289.

(iv.) **P. C.**—*Collision—Presumption of Culpability—Maritime Regulations, s.* 3, *Arts.* 3 (*b*), 5—*Plaintiff's Interest in Cargo.*—When a ship carries its light in the rigging, there is no presumption that such ship is to blame in the absence of proof that the light was in fact intercepted by the sails or otherwise. When the plaintiff in an action for damages to cargo had indorsed his bills of lading to secure advances; *held*, that he retained an interest sufficient to enable him to sue, the money recovered to be for the benefit of the parties entitled thereto.—*The Glamorganshire*, L.R. 13 App. Cas. 454.

(v.) **P. D.**—*Collision—Thames Rules, Art.* 21.—When a steamship navigating the Thames is in such a position, through no fault of those in charge of her, that it is unsafe or impracticable for her to keep out of the way of a sailing-vessel, such sailing-vessel must, on hearing the steamer's whistle sounded as provided in Art. 21, keep out of the way of the steamship. *Quære*, whether the sailing-vessel, on hearing such a signal, is bound to keep out of the way of the steamship, without knowing that it is in fact unsafe or impracticable for the steamship to keep out of her way.—*The Longnewton*, 59 L.T. 260.

(vi.) **P. D.**—*Collision—Thames Rules, Art.* 20—*Dumb Barge.*—A dumb barge starting in clear weather, and getting into a fog, is not guilty of negligence if she comes into contact with a vessel moored in the river, and if such vessel has her anchor not stock-a-wash, and the barge is thereby injured, the vessel so moored is solely responsible for the damage.—*The Rose of England*, 59 L.T. 262.

(vii.) **Q. B. D.**—*Insurance—Average—General Average.*—A policy was effected insuring a ship against all losses not covered by policies containing the clause "warranted free from average under three per cent.,

unless general, or the ship is stranded, sunk, or burnt," *Held*, that the insured was entitled to recover where the particular average loss was less than three per cent., although, if added to the general average loss, it would be more than three per cent., the ship not having been stranded, sunk, or burnt.—*Price* v. *Ships' Small Damage Insurance Co.*, 57 L.J. Q.B. 458.

(i.) **P. D.** — *Limitation of Liability—Priority of Claimants — Merchant Shipping Act*, 1862, *s.* 54.—The plaintiffs, in an action to limit their liability, paid into Court the amount of their statutory liability at the rate of £15 per ton. The sum being insufficient to satisfy in full the claims in respect of loss of life and loss of goods, *held*, that the claimants in respect of loss of life were entitled to be paid the sum of £7 per ton, and then to rank *pari passu* with the claimants in respect of loss of goods against the balance representing £8 per ton, the claimants in respect of loss of goods having no right to priority against such balance.—*The Victoria*, L.R. 13 P.D. 125.

Solicitor :—

(ii.) **C. A.**—*Bill of Costs—Order to Deliver for Taxation — Business not Transacted in any Court—Solicitors Act*, 1843, *s.* 37—*Judicature Act*, 1873, *s.* 16.—Decision of Q. B. D. (*see* Vol. **13**, p. 93, vii.) reversed.—*Re Pollard*, 59 L.T. 96.

(iii.) **Q. B. D.**—*Costs—County Court Rules*, 1886.—A plaintiff commenced a County Court action for £10, and was advised by her solicitors to accept a settlement. She refused to do so, and the solicitors returned her papers to the plaintiff, who proceeded with the action in person. *Held*, that it was a question for the taxing master whether the solicitors had, in fact, acted in the conduct of the action, and that if they appeared to have so acted they could recover no costs other than those specified in the appendix to the County Court Rules.—*E. p. Lamond; in re Dod*, L.R. 21 Q.B.D. 242; 57 L.J. Q.B. 503.

(iv.) **Ch. D.**—*Gift by Client—Right to Set Aside—Right of Personal Representative.*—Where a solicitor has accepted a voluntary gift from his client, the gift cannot be sustained unless something is done, after the relation of solicitor and client has ceased, amounting to a release of the client's right to set it aside. The subsequent settlement by the client of a bill of costs does not amount to such a release. When the client is at the time of his death entitled to set aside such a gift, his personal representative may exercise the right after his death, although the deceased may have expressed his determination not to exercise his right.—*Tyars* v. *Alsop*, 36 W.R. 919.

See Poor Law, p. 15, ii.

Tenant for Life :—

(v.) **Ch. D.**—*Hazardous Securities.*—Where a testator bequeathing his estate on trust for a tenant for life, with remainders over, empowers his trustees to retain any part of his estate in the state of investment in which it may be at his death, however doubtful or hazardous the investment may be, the tenant for life is entitled to the income of the hazardous investments in specie.—*Nixon* v. *Sheldon*, L.R. 39 Ch.D. 50; 59 L.T. 133.

Trade-Mark :—

(vi.) **C. A.**—*Fancy Name—"Reversi"—Patents, Designs, and Trade-Marks Act*, 1883, *s.* 64, *sub-s.* 1 (*c*).—"Reversi," as the name of a game, is descriptive, and not a fancy name, and is not proper for registration.—*Waterman* v. *Ayres*, L.R. 39 Ch.D. 29; 59 L.T. 17.

Trustee:—

(i.) **Ch. D.**—*Appointment of New Trustee—Sole Trustee Dying in Testator's Lifetime—Conveyancing Act,* 1881, *s.* 31.—Where the sole trustee of a will died in the lifetime of the testator, *held,* that a petition was necessary for the appointment of a new trustee.—*In re Ambler's Trusts,* 59 L.T. 210.

(ii.) **Ch. D.**—*Breach of Trust—Duty to enforce Payment of Trust Funds—Payment by Executors of a Legacy de bonis Propriis—Right of Creditor to call on Legatee to Refund.*—Trustees must take prompt proceedings to enforce payment to them of trust funds, especially if by the terms of the trust payment has been deferred for a specified time. The only excuse for not taking proceedings is a well-founded belief that proceedings would be fruitless; and the burden of proving the grounds of such belief is on the trustees. *Semble,* that if in an action against executors for a legacy they admit assets, and are ordered to pay *de bonis propriis,* an unpaid creditor can call on the legatee to refund if the legacy has in fact been paid out of the testator's assets, but not if it has been paid by the executors *de bonis propriis.*—*Billing* v. *Brogden,* L.R. 38 Ch. D. 546.

(iii.) **Ch. D.**—*Duty to Recover Trust Property—Forged Mortgage.*—A person claiming to be transferee of a mortgage of trust property gave the trustees notice of the mortgage. They were convinced that the mortgage was forged, but took no steps to interfere with a sale of the property under the mortgage, and accepted the balance of the purchase money. *Held,* that they were not bound at their own expense, and without an indemnity from their *cestui que trusts* to take steps to question the mortgage, and were not answerable for the loss if any had occurred.—*Tudball* v. *Medlicott,* 36 W.R. 886.

(iv.) **Ch. D.**—*Breach of Trust—Liability for.*—A trustee who does not interfere in the execution of the trusts must contribute towards repayment of a loss caused by improper investments made by his co-trustee.—*Bacon* v. *Camphausen,* 58 L.T. 851.

(v.) **Ch. D.**—*Discretion—Payment into Court—Effect of.*—A testator in settling a legacy to each of his daughters, declared that the trustees might, if they should think fit, advance a portion to the husband of any daughter. The legacy of one daughter was paid into Court under the Trustee Relief Act. An application was made for an advance to her husband to which the surviving trustee assented. *Held,* that the trustees had determined their discretion by payment into Court, that the discretion being a personal one could not be exercised by the Court, and that the advance could not be made.—*Re Nettlefold's Trusts,* 59 L.T. 315.

(vi.) **Ch. D.**—*Payment of Premium on Policy—Lien—Salvage.*—D. was trustee of a term of 100 years, if W. should so long live, in lands. The trusts of the term were to keep down the interest on mortgages of W.'s life estate, and to pay the premiums on policies effected by way of collateral security. W. was adjudicated bankrupt. The rents of the lands being insufficient, D. paid a premium. On W.'s death, *held,* that the trustee's right was to be recouped only out of his trust fund, and that as the policy was not part of the fund of which D. was trustee, he could not claim, as against W.'s trustee in bankruptcy, to be recouped the premium paid.—*In re Earl of Winchelsea's Policy Trusts,* 59 L.T. 167.

Vendor and Purchaser :—

(i.) **Ch. D.**—*Sale of Under Lease—Receipt of Superior Landlord—Conveyancing Act*, 1881, *s.* 3, *sub-s.* 5—*Summons.*—On a sale of an under lease, the contract providing that the vendor should produce the receipt for the last payment of rent, *held*, that the production of a receipt from the ground landlord to whom the vendor had paid the rent under threats of distress was not sufficient. *Held*, that, though the vendor took out the summons, the purchaser was entitled to a return of his deposit with interest and costs.—*Re Higgins and Percival*, 57 L.J. Ch. 807; 59 L.T. 213.

(ii.) **Ch. D.**—*Sale by Trustee—No Power of Sale—Ratification—Time—Reasonableness.*—A purchaser having found that the vendor was only a bare trustee, required that the beneficiaries should ratify the contract. The vendor at first refused, but afterwards promised "without prejudice" that it should be done. *Held*, that the purchaser might have rescinded on the first refusal of his requisition; and that as the vendor could not himself make a good title, or compel a conveyance by those who could, the purchaser was not bound to give him time. *Held*, also, that a delay from August to November was a reasonable time, if the purchaser had been bound to give it.—*Lee* v. *Soames*, 36 W.R. 884.

Watercourse :—

(iii.) **Q. B. D.**—*Right to Pollute—Saving of—Land Drainage Act*, 1861—*Prescription.*—A person carried on the business of a fellmonger on certain premises since 1832, and discharged his refuse into a stream. *Quære*, whether he had acquired in 1861 a prescriptive right to pollute the stream. *Held*, that the right (if any) which existed in 1861, and was saved by the Land Drainage Act, did not justify the discharge of the refuse of another business commenced since, though the burden on the servient tenement was not increased.—*Clarke* v. *Somersetshire Drainage Commissioners*, 57 L.J. M.C. 96; 36 W.R. 890.

Water Rates :—

(iv.) **Q. B. D.**—*Annual Value—Rack-rent—Gross Value—Waterworks Clauses Act*, 1847, *s.* 68.—A water company was empowered by its Act to charge rates on the "annual rack-rent of the house if the same be let at rack-rent, and on the annual value if and while the same is not let at rack-rent." *Held*, that an owner occupying his house must be charged on the gross as distinguished from the net annual value.—*Stevens* v. *Barnet Gas and Water Co.*, 57 L.J. M.C. 82; 36 W.R. 924.

(v.) **Q. B. D.**—*Unoccupied Houses—Owner's Liability—Waterworks Clauses Act*, 1847, *s.* 72.—The owner's liability for water rates on an unoccupied house ceases on the quarterly day of payment next after the house has become unoccupied.—*British Empire Mutual Life Assurance Co.* v. *Southwark and Vauxhall Water Co.*, 59 L.T. 321; 36 W.R. 894.

Will :—

(vi.) **C. A.**—*Construction—Codicil—Revocation of Legacy.*—Testatrix bequeathed her watch to M. and her brooch to J. She also bequeathed £200 to M. A codicil, after reciting the legacies of the watch and the brooch, continued, "Now I hereby revoke the said legacies in favour of M. and J., and declare that my will shall be construed in all respects as if the names of M. and J. had not been inserted therein, and in all other respects I confirm my said will." *Held*, that the legacy of £200 was not revoked.—*Boote* v. *Dutton*, 59 L.T. 21.

(i.) **Ch. D.**—*Construction—Gift Over on Marriage—Taking Effect on Death.* —A gift over on the marriage of the legatee takes effect on his death, although under the gift over such legatee takes a life interest in part of the subject of the gift.—*Scarborough* v. *Scarborough*, 58 L.T. 851.

(ii.) **Ch. D.**—*Construction—Implied Estate Tail.*—Devise of land to A. for life, and if he should die without leaving a son, over. A. died leaving a son. *Held*, that there was an implied gift to A.'s son, which, following the gift to A. for life, was equivalent to a word of limitation, and, by the rule in Shelley's case, gave A. an estate tail.—*In re Bird and Barnard's Contract*, 59 L.T. 166.

(iii.) **Ch. D.**—*Construction—Class Gift—Death in Testator's Lifetime—Subsequent Gift, Original or Substitutionary.*—Gift on trust for sisters, nephews and nieces, the share of each niece to be held on trust for her for life, remainder for her children as therein mentioned; in default of children her share to be in trust for the surviving nieces. The will continued—"If any niece shall die in my lifetime, her share shall be for the benefit of her child or children." *Held*, that the child of a niece who died before the date of the will took nothing under the gift. —*Chinery* v. *Hill*, 57 L.J. Ch. 804; 59 L.T. 303.

(iv.) **Ch. D.**—*Construction—Power of Disposal—Cash.*—Testator gave his personal estate to his widow for her own use so long as she should live, and on her death directed the remainder of his personal estate which might then exist to be "made into money," and bequeathed the same to his brothers, and appointed his widow co-executrix. There was a sum of cash at the bank. *Held*, that the widow had not an absolute power of disposal, but only a life estate, with a right of enjoyment in specie, and that the cash must be invested. — *Holden* v. *Smith*, 57 L.J. Ch. 648.

(v.) **Ch. D.**—*Devise to Trustees—Legal Estate.*—Devise of freehold and fixtures to trustees, their heirs and assigns on trust for A. for life, but subject to a condition to repair and insure, and from and after his decease unto and to the use of the trustees on trust for his children. Mortgage and trust estates were devised "unto and to the use" of the trustees, &c. There was a provision that on the appointment of new trustees the estate should be "vested" in them "upon and for the trusts and purposes aforesaid." *Held*, that the trustees took no estate in the freeholds during A.'s life. A condition as to insuring and repairing by the tenant for life can be enforced by the remainderman, and therefore does not require an estate to be vested in the trustees.—*Tudball* v. *Medlicott*, 36 W.R. 886.

(vi.) **Ch. D.**—*General Power of Appointment—Exercise—Wills Act, s. 27—"Contrary Intention."*—To ascertain whether a testator has shown an intention not to exercise a general power of appointment reserved by a settlement made by himself, the will only can be looked at. In a marriage settlement a general power of appointment was reserved to the husband by will "expressly referring to this power or the subject thereof." By his will (not referring to the power) he gave his residue on trusts differing from those declared by the settlement in default of appointment. *Held*, that the power was exercised.—*Mason* v. *Thorne*, L.R. 38 Ch. D. 630; 57 L.J. Ch. 639.

See Husband and Wife, p. 11, ii.

Quarterly Digest

OF

ALL REPORTED CASES,

IN THE

Law Reports, Law Journal Reports, Law Times Reports, and Weekly Reporter,

FOR NOVEMBER AND DECEMBER, 1888, AND JANUARY, 1889.

By C. H. LOMAX, M.A., of the Inner Temple, Barrister-at-Law.

Administration:

(i.) **Ch. D.**—*Annuity—Tenant for Life—Corpus or Income.*—Testator bought hereditaments, in consideration of an annuity for lives secured by his covenant and by a charge on the hereditaments. He devised and bequeathed his real and personal estate to tenants for life, with remainders over. *Held*, that the annuity ought to be capitalized and paid out of the corpus of the testator's estate, and that past and future payments of the annuity ought to be adjusted on that footing as between the tenants for life and remaindermen.—*Jones* v. *Mason*, L.R. 39 Ch.D. 534; 57 L.J. Ch. 1017; 59 L.T. 499; 37 W.R. 9.

(ii.) **Ch. D.**—*Insolvent Estate—Secured Creditor—Interest on Debt.*—In the administration of an insolvent estate, a mortgaged property of the testator was sold, and the proceeds paid into Court. *Held*, that the mortgagee was entitled to have the proceeds applied, first in payment of interest to the date of payment, and then in payment of principal, and to prove for the unpaid balance of principal, but that the amount of his proof could not exceed the amount of principal due at the date of the judgment in the action.—*King* v. *Chick*, L.R. 39 Ch. D. 567; 37 W.R. 233.

(iii.) **Ch. D.**—*Will of Married Woman—Suit by Husband against Executor.*—A married woman, who had no testamentary capacity, made a will. The husband allowed it to be proved, and afterwards brought an action in the Chancery Division against the executor to recover two sums of money bequeathed by the will to persons other than himself. *Held*, that the husband could not contest the wife's testamentary capacity in such action, but ought to have applied to the Probate Division to recall probate.—*Smart* v. *Tranter*, 37 W.R. 213

(i.) **P. D.**—*Letters of—Special Circumstances—Probate Act*, 1857, *s.* 73—*Grant to Nominee of Creditor.*—Letters of administration, with the will annexed, had been granted to a creditor. The Court, on the application of the creditor, and being satisfied that there were "special circumstances," and that the estate was insolvent, rescinded the grant, and made a grant to a nominee of the creditor, such nominee to be approved by the registrar.—*In the Goods of Brown*, 59 L.T. 523.

Attachment:—

(ii.) **C. A.**—*Petition for Judicial Separation—Order to Pay Money or give Bond as Security for Wife's Costs—Default—Debtors' Act*, 1869, *s.* 4.—A husband, whose wife is seeking judicial separation, may be attached for contempt in failing to obey an order to pay money into Court as security for, or give a bond to pay, the wife's costs.—*Bates* v. *Bates*, 37 W.R. 230.

(iii.) **Ch. D.**—*Receiver—Failure to Pay Money into Court—Discretion of Court—Debtors Act*, 1869, *s.* 4, *sub-s.* 3—*Debtors Act*, 1878, *s.* 1—*Privilege of Parliament.*—A member of Parliament was appointed receiver by the Court. He was ordered to pay into Court a balance found due from him, and failed to do so. After a motion to attach him was made, the money was paid, and the motion stood over by arrangement. On the motion coming on for hearing, he swore that he had no means, and that the money was paid by a friend, and claimed privilege from arrest as a member of Parliament. *Held*, that he was liable to imprisonment as a person acting in a fiduciary capacity; that it was not a case in which the Court should, in its discretion, refuse to attach, and that the privilege of Parliament did not apply.—*Gent-Davis* v. *Harris*, 37 W.R. 151.

See Practice, p. 45, iii.

Auctioneer:—

(iv.) **Ch. D.**—*Remuneration.*—In an action for the administration of a testator's estate it was agreed, with the consent of the chief clerk, that some of the testator's real estate, which was subject to a mortgage, should be sold by the mortgagees under their power of sale. *Held*, after the sale had been effected by auctioneers employed by the mortgagees, that the mortgagees ought only to be allowed such part of the charges paid to the auctioneers as would have been allowed to auctioneers selling the property under the order of the Court.—*Walford* v. *Walford*, 59 L.T. 397.

(v.) **Ch. D.**—*Sale by Order of Court—Deposit—Payment to Solicitor.*—Real estate was ordered to be sold out of Court by the plaintiff, the purchase-money to be paid into Court. The conditions of sale disclosed that the sale was by order of Court. The auctioneer paid the deposit to the vendor's solicitor, who failed to pay it into Court. *Held*, that the auctioneer had discharged his liability with respect to the deposit. *Semble*, that a custom on the part of auctioneers to pay sale moneys to their vendors' solicitors without express authority, cannot be supported. —*Brown* v. *Farebrother*, 58 L.J. Ch. 3.

Award:—

(vi.) **H. L.**—*Compensation—Award Apparently Ambiguous.*—The appellant granted to D. mills in a stream forming the outlet of lochs nearly surrounded by his property, "reserving" all his "rights in the lochs" and stream, "except the right therein connected with the mills." The capacity of the lochs had been increased by embankments on the appellant's land. The respondents, waterworks commissioners, acquired the rights of D., and took from the appellant, under their compulsory powers, a small piece of land, and way-leave for a pipe by which they

diverted the water of the stream. In a claim for compensation the arbitrator (1) found the appellant entitled to £50 for the land and way-leave; and (2) in case the appellant should be entitled to compensation for any right and interest in the lochs, found £3,000 "to be the amount to be paid" in respect of the right and interest to be acquired from him "in the foresaid waters and the embankments, including the sum of £1,650 as the estimated price or value of the embankments." *Held*, that the award was good, as the arbitrator had valued only one thing, the enhanced value of the water in the loch, and had not valued the embankments as a separate subject, but had included as a factor of value the right obtained by the respondents to have the embankments left standing. — *Lord Blantyre* v. *Baptie*, L.R. 13 App. Cas. 631.

Bankruptcy :–

(i.) **Q. B. D.**—*Annulment of Adjudication—Jurisdiction.*—There is no power to annul an adjudication except under the provisions of the Bankruptcy Act. The discharge of a bankrupt having been granted on the payment of a dividend, the dividend having been paid by the bankrupt's brother, the County Court Judge, on application made to him, annulled the adjudication. *Held*, that even if there had been jurisdiction, the order ought not to have been made.—*E. p. Board of Trade; in re Gyll*, 58 L.J. Q.B. 8; 59 L.T. 778; 37 W.R. 164.

(ii.) **Q. B. D.**—*Complete Distribution of Property—Jurisdiction to Decide Questions—Bankruptcy Act*, 1883, s. 102, *sub-s.* 1.—The bankrupt did work for X., under a contract, payment to be received upon an architect's certificate. Certain fittings were to be supplied for £95, to be procured from M. This amount was increased by the architect's direction to £137. Neither of these sums was paid by the bankrupt to M. After the bankruptcy M. received £95 from X. on giving him an indemnity. The trustee applied to X. for the whole £137. The architect refused to give any certificate except for the difference between £137 and £95. On the trustee's motion for an order directing the architect to certify that £137 was due from X. to the bankrupt's estate, and directing X. to pay such sum, the County Court Judge considered that he had no jurisdiction. *Held*, that he had jurisdiction, and ought to have made the order.—*E. p. Gray; in re Holt*, 58 L.J. Q.B. 5.

(iii.) **Ch. D.**—*Composition—Annulment—Discharge of Surety.*—An order adjudging the debtor bankrupt and annulling a composition, discharges the liability of a surety for the payment of instalments due in pursuance of the composition.—*Walton* v. *Cook*, 37 W.R. 189.

(iv.) **C. A.**—*Composition—Binding on Creditors—Bankruptcy Act*, 1883, *s.* 18, *sub-s.* 8.—A composition is binding on all creditors so far as relates to debts and liabilities from which a debtor would be discharged by an order of discharge in bankruptcy.—*Flint* v. *Barnard*, L.R. 22 Q.B.D. 90; 58 L.J. Q.B. 53; 37 W.R. 185.

(v.) **H. L.**—*Conduct of Bankrupt—Bankruptcy Act*, 1883, *ss.* 24, 28 *Refusal to Submit to Medical Examination.*—Decision of C.A. (*see* Vol. **12**, p. 88, vii.) affirmed.—*Board of Trade* v. *Block*, L.R. 13 App. Cas. 570; 59 L.T. 734.

(vi.) **Q. B. D.**—*Defaulting Trustee—Committal.*—A trustee having failed to pay certain moneys into the Bankruptcy Estates Account, and to comply with an order of the Board of Trade to pay such moneys, *held*, that an order to commit him must be made immediately, the order to lie in the office for a week.—*E. p. Board of Trade, in re Nicholson*, 37 W.R. 239.

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(i.) **Q. B. D.**—*Disclaimer—Property held from Crown—Bankruptcy Act*, 1883, *ss.* 55, 150.—The trustee may disclaim the estate and interest of the bankrupt in property held by him of the Crown.—*E. p. Thomas; in re Trotter*, 57 L.J. Q.B. 574.

(ii.) **C. A.**—*Disclaimer—Leasehold Property—Mortgage—Vesting Order—Application by Lessor—Bankruptcy Act*, 1883, *s.* 55, *sub-ss.* (1), (6).—A lessee mortgaged his leasehold by sub-demise and became bankrupt. His trustee disclaimed the property. *Held*, that the lessor was a person claiming an interest in the property, and that on his application an order might properly be made excluding the mortgagee from all interest in and security upon the property, unless he should elect to accept a vesting order under s. 55, sub-s. 6. *Quære*, whether the liabilities and obligations imposed by such order are those of the original lessee, or such as would be incurred by an assignee from the original lessee.—*E. p. Clothworkers' Company; in re Finley*, L.R. 21 Q.B.D. 475; 57 L.J. Q.B. 626; 37 W.R. 6.

(iii.) **Q. B. D.**—*Disclaimer of Lease—Breach of Contract by Trustee—Personal Liability—Bankruptcy Act*, 1883, *s.* 55, *sub-s.* 2—*Agricultural Holdings Act*, 1883, *s.* 8.—The tenant of a farm, restrained by his agreement from selling the hay grown on the farm, became bankrupt. The trustee sold hay in breach of the agreement, and then disclaimed the farm. The landlord sued for removal of the hay, and the trustee counter-claimed for unexhausted improvements. *Held*, that the trustee was personally liable for his wrongful act, and that the counter-claim could not be sustained, as arbitration is compulsory in a dispute between landlord and tenant.—*Schofield* v. *Hincks*, 37 W.R. 157.

(iv.) **C. A. & Q. B. D.**—*Equitable Execution against Goods—Completion of—Bankruptcy Act*, 1883, *s.* 45.—Where execution was issued against the goods of a debtor by a judgment creditor, and an order for the appointment of a receiver was made by a judge, but the execution was not completed by seizure and sale before the debtor was adjudicated bankrupt; *held*, that the creditor was not entitled to retain the benefit of the execution as against the trustee in bankruptcy.—*E. p. Moore; in re Dickenson*, 37 W.R. 96 and 130.

(v.) **C. A.**—*Secured Creditor — Receiver — Bankruptcy Act*, 1883, *s.* 9, *sub-ss.* 2, 45, 168, *sub-s.* 1.—A creditor, on whose judgment goods have been seized in execution, and are held by a receiver under an order, is not a secured creditor entitled to realize as against the trustee in bankruptcy, and is not entitled to take the benefit of the execution, unless completed by seizure and sale.—*E. p. Charrington; in re Dickenson*, 58 L.J. Q.B. 1.

(vi.) **C. A.**—*Judgment—Petition Founded on—Appeal—Stay of Proceedings—Power to go behind Judgment—Bankruptcy Act*, 1883, *s.* 7, *sub-ss.* 3, 4.—Where a judgment debtor, after receipt of a bankruptcy notice, gives notice of appeal from the judgment on which the notice was founded, it is in the discretion of the registrar whether he should stay the petition pending the appeal. The Court cannot, on the hearing of the petition, go behind a judgment, unless it is alleged that there has been fraud or collusion, or an evident miscarriage of justice.—*E. p. Scotch Whiskey Distillers; in re Flatau*, L.R. 22 Q.B.D. 83; 37 W.R. 42.

(vii.) **C. A.**—*Judgment by Consent—Failure to File Order—Bankruptcy Notice—Debtors Act*, 1869, *s.* 27. Where a creditor, in whose favour a judgment has been entered up by consent, omits to file the Judge's order, he may serve the debtor with a bankruptcy notice founded on such judgment.—*E. p. Guest; in re Russell*, 37 W.R. 21.

(i.) **C. A.**—*Notice—Right to Issue—Trustee of Judgment Creditor—Bankruptcy Act*, 1883, *s.* 4, *sub-s.* 1 (*g*).—The trustee in bankruptcy of a judgment creditor is not entitled to issue a bankruptcy notice against the judgment debtor in respect of the judgment debt. —*E. p. Harper; in re Goldring*, L.R. 22 Q.B.D. 87; 58 L.J. Q.B. 3; 37 W.R. 228.

(ii.) **C. A.**—*Notice—Attachment of Shares—Payment prevented—Bankruptcy Act*, 1883, *s.* 4, *sub-s.* 1 (*g*).—A judgment creditor having served a bankruptcy notice on the debtor, obtained a charging order on certain shares belonging to him within the seven days allowed for payment. *Held*, that the debtor was not prevented by the attachment from paying the debt, and was not entitled to have the notice set aside.—*E. p. McMurdo; in re Sedgwick*, 37 W.R. 72.

(iii.) **Q. B. D.**—*Order and Disposition—Debts Growing Due in Course of Trade—Deposit of Hiring Agreement—Bankruptcy Act*, 1883, *s.* 44, *sub-s.* (*iii*).—The debtor deposited with the creditor as security a hire-purchase agreement by which he had agreed to let furniture to be paid for by instalments. No notice was given to the hirer. *Held*, on the bankruptcy of the debtor that the amount payable under the hire-purchase agreement was a debt growing due to the bankrupt in the course of his trade, and that it was in his order and disposition and passed to the trustee.—*E. p. Rawlings; in re Davis* (*No.* 1), 37 W.R. 141.

(iv.) **C. A.**—*Petitioning Creditor—Receiver—Bankruptcy Act*, 1883, *s.* 6.—A receiver in Chancery, appointed by the Court in an action, cannot maintain a petition in bankruptcy as a creditor for moneys due to him as receiver.—*E. p. Sacker, in re Sacker*, 57 L.J. Q.B. 4; 37 W.R. 204.

(v.) **C. A. & Q. B. D.**—*Scheme—Application to Rescind Receiving Order—Bankruptcy Act*, 1883, *ss.* 18, 104.—A receiving order having been made against the debtors on their own petition, they proposed a scheme which the creditors were willing to accept, and with the assent of the creditors applied to the County Court to rescind the receiving order. *Held*, that the registrar was right in refusing to do so.—*In re Dixon; e. p. Dixon*, 59 L.T. 776; 37 W.R. 79 and 161.

(vi.) **Q. B. D.**—*Settlement—Ante-nuptial*—13 *Eliz.*, *s.* 5.—An ante-nuptial settlement will be set aside where the marriage was entered into solely for the purpose of making the settlement valid, and where the parties would never have married but for a desire to put the settled property out of the reach of the settlor's creditors.—*E. p. Cooper: in re Pennington*, 57 L.T. 774.

(vii.) **Q. B. D.**—*Transfer of Actions—Bankruptcy Act*, 1883, *s.* 102, *sub-s.* (4). A trustee in bankruptcy applied to have three actions then pending in the Queen's Bench Division transferred to the judge in bankruptcy. The bankrupt was plaintiff in the first action, and in the other two the defendant in the first action was suing the bankrupt. The defendant in the first action had been ordered to pay money into Court. *Held*, that no advantage would result from the transfer, and that the trial of the first action would be delayed thereby. Application refused.—*E. p. The Trustee; in re Ross*, 37 W.R. 255.

Bastardy:—

(viii.) **Q. B. D.**—*Service of Summons—"Last Place of Abode"—Bastardy Laws Amendment Act*, 1872, *s.* 4.—Defendant had appeared to two bastardy summonses, taken out by the complainant, which were dismissed. Having reason to expect another, he, without the knowledge of the complainant, left his father's house, where he had resided, and resided elsewhere. The third summons was left at the father's house.

Held, by Stephen J., that as the defendant had taken another residence the father's house was not his "last place of abode," and the service was bad. *Held*, by Manisty J., that the father's house was the "last place of abode," and the service was good.—*Reg.* v. *De Winton*, 59 L.T. 382.

Bill of Exchange:—

(i.) **Q. B. D.**—*Banker—Negligence—Forgery—"Fictitious or non-existent" Payee—Bills of Exchange Act*, 1882, *s.* 7, *sub-s.* 3.—V., a foreign correspondent of the plaintiffs, was in the habit of drawing bills on them, payable to the order of C. & Co., a foreign firm. A clerk of the plaintiffs forged the signature of V. to bills purporting to be drawn by V. on the plaintiffs, payable to the order of C. & Co., and resembling the bills which V. was in the habit of drawing, and placed among the plaintiffs' correspondence fictitious letters of advice with respect to such bills resembling those ordinarily received from V. The plaintiffs accepted the bills, and the clerk, having forged C. & Co.'s endorsements on the bills, obtained payment of them from the defendants, the plaintiffs' bankers. *Held*, that the plaintiffs had not been guilty of negligence, that C. & Co. were not "fictitious or non-existent" payees, and that the defendants were not entitled to debit the plaintiffs with the amount of the bills.—*Vagliano Brothers* v. *Bank of England*, L.R. 22 Q.B.D. 103; 58 L.J. Q.B. 27.

Bill of Sale:—

(ii.) **H. L.**—*After-Acquired Property—Statutory Form—Bills of Sale Act*, 1882, *ss.* 4, 5, 9.—Decision of C. A. (*see* Vol. **13**, p. 64, v.) affirmed.—*Thomas* v. *Kelly*, L.R. 13 App. Cas. 506.

(iii.) **H. L.**—*Assignment of After-Acquired Property—Future Book Debts.*—Decision of C. A. (*see* Vol. **12**, p. 26, i.) reversed.—*Tailby* v. *Official Receiver*, L.R. 13 App. Cas. 523.

(iv.) **C. A. & Q. B. D.**—*Assignment of Hiring Agreement—Bills of Sale Act*, 1882, *ss.* 8, 9—*Bankruptcy Act*, 1883, *s.* 44, *sub-s. iii.*—A debtor deposited as security certain hire-purchase agreements of furniture. He afterwards executed an assignment to the creditor of all his interest under the agreements. On the bankruptcy of the debtor; *held*, that the assignment was an assignment of a chose-in action, and did not require registration as a bill of sale, and that the assignee was entitled as against the trustee.—*E. p. Rawlings; in re Davis* (*No.* 2), 37 W.R. 142 and 203.

(v.) **C. A.**—*Register—Rectification—Affidavit—Omission of Particulars—Bills of Sale Act*, 1878, *s.* 10, *sub-ss.* 2, 12, 14.—Decision of Q.B.D. (*see* Vol. **13**, p. 65, iv.) affirmed.—*Crew* v. *Cummings*, L.R. 21 Q.B.D. 420; 57 L.J. Q.B. 641.

(vi.) **H. L.**—*Transaction Equivalent to Mortgage—Bills of Sale Act*, 1882, *s.* 9—*Railways Clauses Act*, 1845, *s.* 97—*Tolls.*—Decision of C. A. (*see* Vol. **12**, p. 66, ix.) affirmed.—*Manchester, Sheffield and Lincolnshire Railway* v. *North Central Wagon Company*, L.R. 13 App. Cas. 554; 59 L.T. 730.

(vii.) **Q. B. D.**—*Consideration—"Truly set forth"—Bills of Sale*, 1882, *s.* 8.—A bill of sale purported to be given for a sum "then owing" by the grantor to the grantee. As to £126, part of that sum, the facts were that the grantee had accepted bills to that amount payable to creditors of the grantor. It was arranged that the grantee should pay, and he

did in fact pay, the bills when due. They were not due, and had not been paid, at the date of the execution of the bill of sale. It was admitted that the transaction was *bonâ fide*. *Held*, that the £126 was not "then owing," that the consideration was not truly set forth, and that the bill of sale was void.—*Mayer* v. *Mindlewich*, 59 L.T. 400.

Bombay Civil Fund:—

(i.) **C. A.**—*Bombay Civil Fund Act*, 1882, *s.* 5—*Mode of Trial.*—On an application to prescribe the mode of trial of a question alleged to arise between the applicant and the Secretary for India as to the liability of the fund, the Court will not enter into any enquiry as to the nature of the applicant's claim. *Ordered*, that the parties should proceed by statement of claim, defence, and reply, and generally as nearly as may be to the proceedings in an action.—*E. p. Pringle; in re Bombay Civil Fund Act*, 1882, L.R. 39 Ch. D. 300.

Bond:

(ii.) **C. A.**—*Condition—Penalty—Injunction.*—A., on entering the employment of the N. Bank, executed a bond in a penal sum, conditioned to be void if A. should pay to the N. Bank the stated penalty as liquidated damages in case, within two years after retiring from the employment of the N. Bank, he should accept employment with any other bank within twenty miles. A. left the N. Bank, and immediately accepted employment with another bank within twenty miles. *Held*, that the N. Bank was entitled to an injunction to restrain A. from accepting such employment. *National Provincial Bank of England* v. *Marshall*, 37 W.R. 183.

Building Society:—

(iii.) **C. A.**—*Arbitration—Dispute between Society and Member—Building Societies Act*, 1884, *s.* 2.—Decision of Ch. D. (*see* Vol. **14**, p. 4, iii.) affirmed.—*Municipal Permanent Investment Building Society* v. *Richards*, L.R. 39 Ch. D. 372; 58 L.J. Ch. 8; 37 W.R. 184.

(iv.) **Q. B. D.**—*Borrowing Powers—Deposit Note for past Loan—Ultra Vires—Building Societies Act*, 1874.—An unincorporated building society, with no power to borrow, borrowed money on the security of promissory notes of the directors to be paid out of the funds of the society. The society was afterwards incorporated and acquired borrowing powers. The lender gave up the notes of the directors, and received instead a deposit loan note of the society. *Held*, that the deposit loan note was not binding on the society.—*E. p. Watson*, 57 L.J. Q.B. 609.

See Mortgage, p. 42, vii.

Charity:—

(v.) **Ch. D.**—*City of London Parochial Charities Act*, 1883, *s.* 10—*Vested Interest.*—A vested interest under the Act is an interest of some person who has received, for his own benefit, an emolument in respect of an office which he has held. The rector and churchwardens of a parish, who have received, and applied towards the repairs of a parish church, part of the income of a charity, have no "vested interest."—*Re St. John the Evangelist; D'Aungre's Charity*, 59 L.T. 617.

(vi.) **Ch. D.**—*City of London Parochial Charities Act*, 1883, *ss.* 5, 7, 10—*Consecrated Ground—User for Secular Purposes—Corporation—Vested Interests.*—Houses were built on consecrated ground and the rents were for 300 years applied for general parish purposes. *Held*, that they were charity property within the meaning of the Act. A church was vested, by

an Act of Henry VIII., in the parson, churchwardens, and parishioners of a parish. Land was held by the parson, churchwardens, and parishioners under a lease granted in 1587, "for the relief of poor, &c., persons of the said parish, and the necessary reparations of the said parish church." The rents were applied for general parish purposes. *Held*, that the parson, churchwardens, and parishioners were a corporation for the purpose only of taking the church, and that the property was not taken by them to hold as their own, but was charity property. *Held*, also, that the parson, churchwardens, and parishioners had no "vested interests" in the property.—*Re St. Alphage, London Wall*, 59 L.T. 614.

Colonial Appeal:—

(i.) **P. C.**—*Appealable Amount—Special Leave to Appeal.*—The measure of value for determining whether a defendant is entitled to appeal is the amount recovered by the plaintiff in the action in which the appeal is brought. The Privy Council will not give special leave to appeal on the ground that important questions of law are involved when it appears that the respondent is too poor to instruct counsel to appear.—*Allan* v. *Pratt*, L.R. 13 App. Cas. 780; 57 L.J. P.C. 104; 59 L.T. 674.

See Practice, p. 47, v.

Colonial Law:—

(ii.) **P. C.**—*Canada—Arbitrator—"Amiables Compositeurs."*—By the law of Canada arbitrators must decide according to the rules of law, unless they are appointed as "amiables compositeurs." Arbitrators who were so appointed, with the knowledge of all parties, obtained legal opinions with respect to the law applicable to the matters referred to them. *Held*, that there was no such irregularity as to vitiate the award.—*Rolland* v. *Cassidy*, L.R. 13 App. Cas. 770; 57 L.J. P.C. 99.

(iii.) **P. C.—Canada.**—*Partnership—Act of Partner—Liability of Firm.*—By the Civil Code of Canada, a contract purporting to bind a partnership binds only the partner contracting when he acts without authority of his partners, unless the partnership is benefited by his act. One of a firm without authority from his partners made an advance to a person for the purposes of his business, at a fixed rate of interest and a share of the profits of the borrower's business, such interest and share of profits to be paid to the firm. The interest was paid but no profits. *Held*, that the partnership was not bound by the contract, and that the partners of the lender were not made partners with the borrower.—*Singleton* v. *Knight*, L.R. 13 App. Cas. 788; 57 L.J. P.C. 106; 59 L.T. 738.

(iv.) **P. C.—Canada.**—*Prescription.*—By the Civil Code of Canada a person acquiring land in good faith by purchase prescribes the ownership by effective possession for ten years by virtue of his title. A. and B. purchased adjacent lots of land. A. marked off his boundary. B. took possession of his lot which included a portion of the lot marked off by A., and held it without challenge for more than ten years. *Held*, that the marking-off by A. did not constitute possession, and that B.'s possession perfected his title.—*Dunn* v. *Lareau*, 57 L.J. P.C. 108.

(v.) **P. C.—Malta.**—*Primogenitura—Descent in Male Line Derived from Female—Descent of Barony.*—The founders of a Maltese primogenitura limited the succession by deed in 1695 to the eldest and other sons of F., the original donee, and their respective male lines, and on failure of those lines to his female issue and their respective descendants in

a prescribed order, derived from indications in the deed that the line of descent was to be exclusively male though traced from a female head of the line. *Held*, that the male line of descendants from a female ancestress through males were intended to take exclusively of females till the male line was exhausted, and consequently that the half-brother of the last holder succeeded in preference to his daughter. F. also held a barony under a settlement of 1674, which limited the same to his descendants. *Held*, that to the extent permitted by the Pragmatic of Philip IV., No. 34, F. could, by his will, annex the barony to the said primogenitura, and so make it descend to males in preference to females. — *D'Amico v. Trigona*, L.R. 13 App. Cas. 806.

Company:—

(i.) **Ch. D.**—*Directors - Notice of Meeting—Formality.*—A company invited applications for new shares. At a meeting of all the directors (five in number) it was resolved that no allotment should be made until 14,000 shares should be applied for. At a meeting of two directors (a quorum) held shortly afterwards, the resolution was cancelled, and it was resolved that 3,000 shares, which had been applied for, should be allotted. The last meeting was held at two o'clock. Only a few hours notice was sent to two of the directors who did not attend. One of them did not receive his notice till next day; the other gave notice that he could not attend till three o'clock. No notice was sent to the fifth director, who was abroad. *Held*, that the allotments made at the latter meeting were void against the allottees.—*In re Homer District Consolidated Gold Mines; e. p. Smith*, L. R. 39 Ch. D. 546.

(ii.) **Ch. D.**—*Directors—Misfeasance—Negligence—Brokerage on Placing Capital.*—Directors are not liable for misfeasance on account of a grave error of judgment, there being no corruption or dishonesty on their part. The payment of a brokerage for placing shares is *ultra vires*, and cannot be justified either as part of the "preliminary expenses," or as "conducive to the objects of the company."—*In re Faure Electric Accumulator Co.*, 58 L.J. Ch. 48; 37 W.R. 116.

(iii.) **C. A.**—*Unregistered — Directors — Qualification — Shares — Transfer — Validity—Companies Act*, 1862, *s.* 199.—See Vol. 14, p. 7, i.—*Held*, that the eight persons named in the Company's Act were thereby constituted statutory members of the company as well as statutory directors, with an obligation to continue to hold both characters until the first general meeting; and that, therefore, as no general meeting had been held before the presentation of the winding-up petition, those persons still were "members" of the company, notwithstanding the transfer of their shares, and without reference to the question whether that transaction was fraudulent or not. *Held*, therefore, that there was jurisdiction to make a winding-up order.—*In re South London Fish Market Co.*, L.R. 39 Ch. D. 324; 37 W.R. 3.

(iv.) **Ch. D.**—*Life Assurance—Deed of Settlement—Power to Alter—Sale of Business.*—The deed of settlement of an unincorporated life assurance company contained no provision for the sale or transfer of its business, but provided that the proprietors might alter, amend, or repeal its laws and provisions. Resolutions were passed with due formalities to take power to sell and transfer the business. *Held*, that a sale and transfer was *intra vires.*—*In re Argus Life Assurance Co.*, L.R. 39 Ch. D. 571; 59 L.T. 689; 37 W.R. 215.

(v.) **Ch. D.**—*Prospectus—Misstatement—Measure of Damages.*—The prospectus of a company stated that £200,000 share capital had been

already subscribed. Only £35 had been in fact subscribed, but X. had agreed to take up £200,000 in fully paid-up shares as the consideration for the sale of a concession, and as part payment for the construction of works. *Held*, that the statement was material and untrue, and that persons who had taken debenture stock on the faith of it were entitled to damages, to be measured by the difference between the actual value of the stock and the price paid for it.—*Arnison* v. *Smith*, 59 L.T. 627.

(i.) **Ch.**—*Rectification of Register—Blank Transfer—Sale of Shares—Company's Act*, 1862, *s.* 35.—Decision of Ch. D. (*see* Vol. **13**, 67, iii.), affirmed.—*E. p. Weryher; in re Kimberley Diamond Co.*, 59 L.T. 579.

(ii.) **Ch. D.**—*Reduction of Capital—Preference Shares.*—The articles of a company contained no power to reduce capital, and provided that with the sanction of a special resolution the capital might be increased, and preference shares issued. First and second preference shares were issued bearing preferential dividends at 8 and 6 per cent. in perpetuity. The holders of the preference shares were to have no voting powers. Special resolutions were afterwards passed giving the company power to reduce its capital. Special resolutions were then passed to reduce the first preference shares from £100 to £75 each, and the ordinary and second preference shares from £10 to £7 10s. each. The majority of the preference shareholders consented. *Held*, that the preference shareholders had taken their shares subject to any power to reduce capital which might be afterwards acquired, that the company had not contracted, and had no power to contract, that the preference shares should not be reduced; and that there was no reason to refuse the sanction of the Court to the reduction. *Semble*, that a company can in a proper case write off part of one class of shares without reducing all other classes of shares.—*In re Barrow Hæmatite Steel Co.*, L.R. 39 Ch.D. 582; 59 L.T. 500; 37 W.R. 249.

(iii.) **C. A.**—*Winding-up—Costs of obtaining Special Act—Claim by Parliamentary Agent.*—H., a parliamentary agent, instructed by S., a promoter, obtained a special Act of Parliament for a company. The Act enacted that the costs, &c., incident to obtaining the Act should be paid by the company. *Held*, in the winding-up, that H., not having acted directly for the company, could not claim against the company in respect of the costs of the Act.—*E.p. Hanly; in re Skegness Tramway Co.*, 37 W.R. 225.

(iv.) **C. A.**—*Winding-up—Rates—Distress for—Leave of Court.*—After the appointment of a provisional liquidator rates were assessed in respect of the premises of a company, and a distress was levied by the overseers, without having obtained leave, though they were aware of the appointment of the liquidator. Resolutions were afterwards passed for a voluntary winding-up which was continued under supervision, and official liquidators were appointed. *Held*, that the existence of a provisional liquidator ought not to prevent the overseers from obtaining payment of the rates in full by means of a distress put in before the commencement of the winding-up; and that, though they ought not to have distrained without leave, they ought not to lose their rights by having done so; and that, accordingly, the official liquidators could not restrain them from selling the goods taken under the distress.—*In re Dry Docks Corporation of London*, L.R. 39 Ch. D. 306; 58 L.J. Ch. 33; 59 L.T. 763; 37 W.R. 18.

(v.) **C. A.**—*Winding-up—Supervision Order.*—Decision of Ch. D. (*see* Vol. **14**, p. 7, iii.) affirmed.—*In re New York Exchange, Limited*, L.R. 39 Ch. D. 415.

(i.) **Ch. D.** — *Winding-up Petition — Withdrawal — Costs.* — When a winding-up petition is withdrawn by the petitioner, each set of shareholders, and each set of creditors appearing, whether to support or oppose the petition, is as a general rule entitled to a separate set of costs, and this rule applies even when the petition is presented by the company itself.—*In re Paper Bottle Co.*, L.R. 40 Ch. D. 52; 37 W.R. 214.

See Master and Servant, p. 41, v. Practice, p. 45, v.

Copyright:—

(ii.) **C. A.**—*Title of Newspaper—Trade Name—Reputation.*—Decision of Ch. D. (*see* Vol. **13**, p. 70, iii.) affirmed.—*Licensed Victualler's Newspaper* v. *Bingham*, 58 L.J. Ch. 36.

Corporation:—

(iii.) **Ch. D.**—*Contract—Affixing Seal—Mutuality.*—The defendants signed and sent to the plaintiffs a contract for the supply of stone. The plaintiffs made an alteration in the contract to which the defendants assented, and the plaintiffs afterwards affixed their seal to the contract. *Held*, that there was mutuality between the parties at the time the seal was affixed, and that the contract was good.—*Dartford Guardians* v. *Trickett*, 59 L.T. 754.

Costs:—

(iv.) **Ch. D.**—*Administration—Trustees—Delay—Negligence—R.S.C.*, 1883, *O.* lxv., *r.* 11.—The Court will not allow the costs occasioned by improper litigation, or by negligent conduct of administration proceedings, to be paid out of an estate under its care. The amount of costs allowed by a taxing master as between the client and his solicitor is not conclusive as to the amount which the Court will allow trustees out of the estate.—*Brown* v. *Burdett*, 59 L.T. 388.

(v.) **C. A.**—*Administration Action—Useless Proceedings—Delay—R.S.C.*, 1883, *O.* xlv., *rr.* 1, 11.—Decision of Ch. D. (*see* Vol. **13**, p. 37, iv.) affirmed.—*Goldring* v. *Lancaster*, 59 L.T. 594.

(vi.) **Ch. D.**—*Lands Clauses Act*, 1845, *s.* 80—*Land Vested in Trustee—Purchase Money in Court—Petition for Transfer—Costs of Trustee.*—Land vested in a trustee, which was the subject of an action, was taken by the Metropolitan Board of Works under their compulsory powers; the purchase money was paid into Court, and the lands conveyed by the trustee to the Board. A petition was presented for the transfer of the money to the credit of the action, and was served on the trustee. *Held*, that the trustee was entitled to appear, and that his costs must be paid by the Board.—*In re English's Trusts*, L.R. 39 Ch. D. 556; 57 L.J. Ch. 1048; 37 W.R. 191.

County Court:—

(vii.) **C. A.**—*Jurisdiction—New Trial—Prohibition.*—Decision of Q.B.D. (*see* Vol. **13**, p. 110, iv.) affirmed.—*Reg.* v. *Greenwich Judge*, 37 W.R. 132.

Criminal Law:—

(viii.) **C. C. R.**—*Husband and Wife—Assault.*—A husband, knowing that he was suffering from a venereal disease, had connection with his wife, and communicated the disease to her. She did not know that he was suffering from the disease. He was indicted for "unlawfully and maliciously inflicting grievous bodily harm," and for an "assault

occasioning actual bodily harm." *Held*, that a conviction could not be sustained. — *Reg.* v. *Clarence*, L.R. 22 Q.B.D. 23; 59 L.T. 780; 37 W.R. 167.

(i.) **C. C. R.**—*Libel Calculated to Provoke Breach of Peace.*—Y., a young woman of good character, advertised for a situation. A. wrote to her offering her a sum of money to allow him to have immoral intercourse with her. The letter was opened by Y.'s relations, and was not seen by her. *Held*, that A. was rightly convicted of writing and publishing a defamatory libel calculated to provoke a breach of the peace.—*Reg.* v. *Adams*, L.R. 22 Q.B.D. 66; 58 L.J. M.C. 1.

Damages :—

(ii.) **P. C.**—*Lord Campbell's Act—Compensation for Death—Insurance.*—The right conferred by Lord Campbell's Act, adopted by the Consolidated Statutes of Ontario, to recover damages in respect of death caused by negligence is restricted to the actual pecuniary loss suffered by the plaintiff. Where the widow of the deceased is plaintiff, and her husband had effected a policy on his life in her favour, the amount of such policy is not to be deducted from the amount of damages estimated independently of such consideration. She is benefited only by the accelerated receipt of the insurance money, and that benefit may be compensated by deducting future premiums from the estimated future earnings of the deceased.—*Grand Trunk Ry. of Canada* v. *Jennings*, L.R. 13 App. Cas. 800; 58 L.J. P.C. 1; 59 L.T. 679.

See Company, p. 33, v. Ship, p. 52. iii.

Domicil :—

(iii.) **C. A.**—*Legitimacy—Domicil of Birth—Foreign Nationality.*—Decision of Ch. D. (*see* Vol. **13**, p. 72, ii.) affirmed.—*Vaucher* v. *Solicitor to the Treasury*, 59 L.T. 587; 37 W.R. 1.

Donatio Mortis Causâ :—

(iv.) **C. A.**—*Imperfect Testamentary Instrument.*—A., being in his last illness, signed the following document:—"I give all my insurance money to my wife B., for her own use, as well as £200 at the bank. This is my wish. Witness C." The document was at A.'s request placed with his will, where it remained till his death. *Held*, that the document was an imperfect testamentary instrument, and could not take effect as a donatio mortis causâ, nor as an immediate assignment.—*Re Hughes*, 59 L.T. 586.

Easement :—

(v.) **Ch. D.**—*Ancient Light—Interruption—Prescription Act, ss.* 3, 4.—Where a window has shutters which are only opened occasionally, such opening being at the owner's pleasure, the right to light is being "actually enjoyed," and there is no such interruption as will prevent the acquisition of the right to access of light.—*Cooper* v. *Straker*, L.R. 40 Ch. D. 21; 58 L.J. Ch. 26; 37 W.R. 137.

(vi.) **C. A.**—*Right of Way—Grant of—Way no Longer Existing.*—The premises of the plaintiff and defendant respectively were from 1786 to 1872 owned by the same person. Down to the year 1852 the occupiers of both premises used a private road. In 1852 the occupier of the plaintiff's premises built a wall separating his premises from such road. In 1872 the premises were granted to the plaintiff and defendant respectively, together with all ways "now or heretofore" held or enjoyed as appurtenant to the premises. *Held*, that the grant did not pass to the plaintiff a right of way over the private road.—*Roe* v. *Siddons*, 37 W.R. 228.

Ecclesiastical Law :—

(i.) **P. C.**—*Citation of Bishop—Refusal—Appeal.*—The archbishop has jurisdiction to cite a bishop in respect of ecclesiastical offences, and an appeal lies to Her Majesty in Council from his refusal to do so.—*E. p. Read*, L.R. 13 P.D. 221.

Highway :—

(ii.) **C. A.**—*Highway Act*, 1835, s. 67—*Highway Act*, 1862, s. 43—*Turnpike Act*, 1823, s. 27 "*Drain*"—*Dumbwell.*—Decision of Ch. D. (*see* Vol. **13**, p. 113, i.) reversed.—*Croft* v. *Rickmansworth Highway Board*, L.R 39 Ch. D. 272; 58 L.J. Ch. 14.

Husband and Wife :—

(iii.) **C. A.**—*Agreement to live separately—Action for Arrears of Maintenance—Consideration—Statute of Frauds, s.* 4.—Decision of Q.B.D. (*see* Vol. **13**, p. 74, v.) affirmed. —*McGregor* v. *McGregor*, L.R. 21 Q.B.D. 424; 57 L.J. Q.B. 591; 37 W.R. 45.

(iv.) **P. D.**—*Agreement not to Sue—Consideration—Bar—Proceedings for Nullity.*—Where a husband and wife have agreed to live apart, and not to make any claim against each other in a court of law or equity, the wife's agreement not to sue is a sufficient consideration for the husband's agreement not to do so, and the agreement, though not by deed, is a bar to proceedings by the husband for a declaration of nullity by reason of the wife's incapacity.—*Aldridge* v. *Aldridge*, L.R. 13 P.D. 210; 37 W.R. 240; *A.* v. *M.* 58 L.J. P. 8.

(v.) **P. D.**—*Divorce—Desertion.*—A husband and wife separated by mutual consent on account of the husband's pecuniary embarrassments. The wife lived under an assumed name, and the husband visited her clandestinely, and had sexual intercourse with her till 1885. In August, 1885, the wife, suspecting that the husband was living in adultery, refused to have further sexual intercourse with him. The visits of the husband continued, and the parties remained on friendly terms till 1888. The husband was, in fact, living in adultery in 1885 and afterwards. *Held*, that the limited cohabitation was brought to an end in August, 1885, that the husband's conduct amounted to desertion from that time, and that the wife was entitled to a divorce for adultery and desertion.—*Garcia* v. *Garcia*, L.R. 13 P.D. 216; 57 L.J. P. 101; 59 L.T. 524.

(vi.) **P. D.**—*Divorce—Practice—Amendment of Petition—Desertion.*—A wife, shortly after her husband left her, filed her petition for divorce, alleging adultery and cruelty. Subsequently she asked leave to amend her petition by adding a charge of desertion for two years and upwards. *Held*, that as the claim to relief on the ground of desertion arose after the date of the original petition, the fresh charge must be made by a fresh petition.—*Lapington* v. *Lapington*, 59 L.T. 608.

(vii.) **P. D.**—*Nullity—Deceased Wife's Sister.*—A decree will be made declaring the nullity of the marriage of a man with his deceased wife's sister, although it is shewn that both parties at the time of the celebration of the marriage were aware of the impediment.—*Andrews* v. *Ross*, L.R. 14 P.D. 15; 58 L.J. P. 14; 37 W.R. 239.

(viii.) **Ch. D.** *Married Women's Property Act*, 1882—*Devolution of Separate Personalty of Wife—Will—Form of Probate.*—The husband is still entitled on the death of the wife to her undisposed-of separate personalty. A married woman made a will in 1887 in exercise of a power of appointment, and appointed executors. The will did not purport to

dispose of any property other than the subject of the power. She was entitled at her death to separate personal estate not included in the power. Probate of the will was granted without any exception or limitation. *Held*, that the executors were trustees for the husband of the property undisposed of, and that the probate duty and costs ought to be apportioned rateably between the appointed and the undisposed-of property.—*Stanton* v. *Lambert*, L.R. 39 Ch. D. 626; 57 L.J. Ch. 927; 59 L.T. 429.

Infant:—

(i.) **Q. B. D.**—*Contract—Validity—Infants' Relief Act*, 1874, *s.* 1.—An infant contracted to serve as assistant to a dairyman at a salary, and agreed not to serve any of his master's customers while in his employment, or for two years afterwards. *Held*, that the contract was for the benefit of the infant, and was neither void nor voidable, and could be enforced against him by injunction.—*Fellows* v. *Wood*, 59 L.T. 513.

(ii.) **C. A.** — *Ward of Court — Marriage — Contempt—Settlement—Infant's Settlement Act*, 1855, *s.* 1.—The contempt of Court committed by an infant ward of Court in marrying without the sanction of the Court does not give the Court jurisdiction to compel the infant to make a settlement of his or her property; neither does the Infant Settlement Act, 1855, give the Court power to compel an unwilling infant to make such a settlement. *Quære*, whether the Act applies to the case of the marriage of a male infant under twenty years of age.—*Leigh* v. *Leigh*, 37 W.R. 241.

Insurance:—

(iii.) **H. L.**—*Fire—Claim by Insured Bond-holder—Rent*—14 *Geo. III.*, *c.* 78, *s.* 83.—A., having a heritable security by bond on premises, insured them in the X. office. There were prior bonds secured on the premises, the holders of which had insured in other offices. The premises were of sufficient value to cover all the bonds. The premises were partly destroyed by fire, and the prior bondholders received from their insurers an amount sufficient to reinstate the premises, and to pay the rent during the reinstatement, but did not reinstate them. The premises were, in consequence of the fire, insufficient in value to satisfy the balance of the prior bond-holder's claims, and also A.'s bond. *Held*, that A. was entitled to recover the amount of his loss. *Held*, that he was not entitled to recover anything in respect of loss of rent. *Semble*, that the statutory provision relative to the application of insurance money on houses destroyed by fire does not apply to Scotland.—*Westminster Fire Office* v. *Glasgow Provident Society*, L.R. 13 App. Cas. 699; 57 L.T. 641.

Landlord and Tenant:—

(iv.) **Q. B. D.**—*Agricultural Holdings Act*, 1883, *ss.* 19, 55, 57—*Award of Compensation—Specification of Items.*—A tenant claimed compensation under the Agricultural Holdings Act, and the landlord claimed for dilapidations and breaches of covenant. Referees were appointed who disagreed, and by a letter signed by both appointed an umpire "to settle all differences that have arisen between us in this valuation, which relate to compensation for, &c., and counterclaims for dilapidations and breaches of covenant on both sides, under a lease dated, &c., and under the Agricultural Holdings Acts, 1875 and 1883." The umpire awarded a gross sum to the tenant. *Held*, that there was evidence that the reference and award were outside the Agricultural Holdings Act, although they included matters within the Act, that the reference was a common law reference, and that the award was valid although it did not comply with the Act.—*Shrubb* v. *Lee*, 59 L.T. 376.

(i.) **C. A.**—*Assignment—Surrender of Part of Premises—Liability of Lessee on Covenant to pay Rent.*—See Vol. **13,** p. 116, vi. *Quære*, whether the lessee remains liable for the whole rent after assignment and surrender by the assignee of part of the demised premises. *Held*, that he was liable for the amount claimed in the action, being the rent reserved after deducting a fair proportion on account of the part of the premises surrendered.—*Baynton* v. *Morgan*, L.R. 22 Q.B.D. 74; 37 W.R. 148.

(ii.) **C. A.**—*Covenant by Lessor to pay Rates—Water Rate.*—The lessor covenanted to pay "all rates, taxes and impositions whatsoever, whether Parliamentary, parochial, or imposed by the corporation of the city of London, or otherwise howsoever," in respect of the demised premises. *Held*, that he was not bound by the covenant to pay water rates, for water supplied by a water company.—*Badcock* v. *Hunt*, 37 W.R. 205.

(iii.) **Q. B. D.**—*Parol Demise—Surrender—Accrued Rent—Right to Recover.*—11 *Geo. II.*, *c.* 19, *s.* 14.—Rent which has accrued due under a parol demise at the time of a surrender of the term by operation of law, may, after such surrender, be recovered in an action for use and occupation, notwithstanding the absence of a personal covenant.—*Shaw* v. *Lomas*, 59 L.T. 477.

(iv.) **Ch. D.**—*Quiet Enjoyment—Nuisance—Injunction—Damages.*—A. granted a lease of two rooms to X., with a covenant for quiet enjoyment. A. then let a room above them to B. for dancing and other entertainments. X. sued A. and B. for an injunction to restrain their use of the upper room, alleging that the dancing and the behaviour of visitors on the stairs was a breach of the covenant for quiet enjoyment, and a nuisance. *Held*, that the annoyance was no breach of the covenant, and that the injunction should not be granted. *Held*, that the annoyance from dancing was a nuisance for which damages should be given; but that the annoyance from visitors on the stairs was not a nuisance for which the defendants were liable.—*Jenkins* v. *Jackson*, L.R. 40 Ch.D. 71; 37 W.R. 253.

(v.) **C. A.**—*Restrictive Covenant—"Business" Nuisance—Hospital.*—Decision of Ch. D. (*See* Vol. **13,** p. 117, iii.) affirmed.—*Tod Heatly* v. *Benham*, 37 W.R. 38.

See Bankruptcy, p. .8, iii.

Libel:—

(vi.) **C. C. R.**—*Newspaper Libel Act*, 1881, *s.* 3—*Fiat of Director of Public Prosecutions.*—The A. Company printed for the B. Company, who published it, a newspaper containing a libel. *Held*, that in the absence of evidence of knowledge of the contents of the newspaper, the directors of the A. Company and the signatories to the articles of association of the B. Company were wrongfully convicted of publishing the libel. The fiat of the Director of Public Prosecutions was granted against the "Editor" of the newspaper, without naming him. *Held*, that the fiat was bad.—*Reg.* v. *Judd*, 37 W.R. 143.

(vii.) **Q. B. D.**—*Trade Publication—List of Judgments.*—Judgment was recovered against the plaintiff in a County Court. He did not satisfy the judgment till he had commenced and abandoned an appeal. He omitted to get the satisfaction, when made, entered in the County Court register. The defendant published a trade newspaper which contained a list of judgments copied from the register, including that against the plaintiff. The plaintiff, in an action for libel, alleged by inuendo that the insertion of his name implied that the judgment remained unsatisfied. and that

he was unworthy of credit. *Held*, that the meaning of the allegation was properly left to the jury.—*Williams* v. *Smith*, 58 L.J. Q.B. 21; 59 L.T. 757; 37 W.R. 93.

Licensing:—

(i.) **C. A.**—*Renewal—Discretion of Justices.*—9 *Geo. IV.*, c. 61, *s.* 1—*Licensing Act*, 1872, *s.* 42—*Licensing Act*, 1874, *s.* 32.—Decision of Q. B. D. (*see* Vol. **13**, p. 118, iv.) affirmed.—*Sharpe* v. *Wakefield*, 37 W.R. 187.

Limitations:—

(ii.) **P. C.**—*Statute of—Intruder—Relinquishment by*—3 & 4 *Will. IV.*, *c.* 27.—The Statute of Limitations, which was adopted by the New South Wales Act, No. 3 of 1837, does not continue to run against a rightful owner after an intruder has relinquished possession without acquiring title under the Act.—*The Agency Company* v. *Short*, L.R. 13 App. Cas. 793; 58 L.J. P.C. 4; 59 L.T. 676.

See Local Government, p. 40, iii. Tithes, p. 54, iii.

Local Government:—

(iii.) **C. A.**—*Guardians Acting as Rural Sanitary Authority—Limitations*—22 & 23 *Vict.*, *c.* 49, *s.* 1—*Public Health Act*, 1875, *s.* 9.—Debts contracted by Guardians of the Poor acting as the rural sanitary authority are not subject to the special limitation of time imposed on debts contracted by guardians as such.—*Dearle* v. *Petersfield Guardians*, L.R. 21 Q.B.D. 447; 57 L.J. Q.B. 640; 37 W.R. 113.

(iv.) **Nisi Prius.**—*Officer of Local Authority—Fee or Reward in addition to Salary—Public Health Act*, 1875, *ss.* 189, 193.—The defendant was town clerk of B., and was appointed clerk to the local sanitary authority on the town council becoming such authority. He was paid a fixed salary, including all legal charges, except for contentious matters, travelling expenses, and expenses out of pocket. Sewage works were promoted, and carried on for three years by the sanitary authority, and the defendant did extra legal work occasioned thereby. On the conclusion of the works the town council paid the defendant 500 guineas in addition to his salary, for his services in providing mortgages and contracts, attending and conducting an inquiry before the Local Government Inspector, and other work as a solicitor. *Held*, that the acceptance of such sum was not an acceptance under the colour of his office or employment of a fee or reward other than his proper salary.—*Edwards* v. *Salmon*, 59 L.T. 416.

(v.) **Q. B. D.**—*Paving New Street—Apportionment of Expenses—Metropolis Management Act*, 1862, *s.* 77.—The apportionment of the expenses of paving a new street in the Metropolis need not be made on any uniform principle, but is in the absolute discretion of the vestry or local board, and can only be questioned on the ground of want of good faith.—*Stotesbury* v. *Vestry of St. Giles', Camberwell*, 57 L.J. M.C. 114; 59 L.T. 473.

(vi.) **Ch. D.**—*Water Mains—Report of Surveyor—"Appears Necessary"—Public Health Act*, 1875, *ss.* 16, 54, 189.—The report to be made to a local authority of the necessity of carrying water mains through any land, must, in order to give the local authority power to carry the mains through such land, be made by the person duly appointed "surveyor" according to the Public Health Act, and not by any engineer whom the local authority may consult. If the "surveyor" exercises a *bonâ fide* judgment on the matter in making such report, the Court will not interfere. — *Lewis* v. *Weston-Super-Mare Board of Health*, L.R. 40 Ch. D. 55; 58 L.J. Ch. 39; 59 L.T. 769; 37 W.R. 121.

Lunatic:—

(i.) **C. A.**—*Surplus Income—Allowance to Collaterals.*—The Court will not make an allowance out of the surplus income of a lunatic's estate to collaterals unless the evidence shows that the lunatic would in all probability have made the proposed allowance himself if sane. But where the lunatic is entitled to landed property and the collateral is his heir-at-law different considerations apply. The Court refused to make an allowance to some of the next-of-kin of a lunatic, who were in indigent circumstances, although the lunatic was aged eighty-two, and there was a large surplus income, and although the application was not opposed.—*In re Darling*, L.R. 39 Ch. D. 208; 57 L.J. Ch. 891; 59 L.T. 761.

Married Woman:—

(ii.) **P. D.**—*Separate Estate—Costs of Divorce Suit—Guilty Wife.*—A wife who has been divorced for her adultery may be condemned in costs if she has separate estate on which an order for costs can operate, and the Court will not consider whether at the time she committed the wrongful act she had or had not any separate estate.—*Hyde* v. *Hyde*, 59 L.T. 523.

(iii.) **C. A.**—*Separate Use—Restraint on Alienation.*—Decision of Ch. D. (*see* Vol. **13**, p. 78, vi.) reversed.—*Re Hutchings to Burt*, 59 L.T. 490.

Master and Servant:—

(iv.) **Q. B. D.**—*Liability of Master—Damage to Street Lamps—Metropolis Local Management Act, s.* 207.—A van, which the defendant's servant was driving, came in contact with, and damaged, a street lamp, the top of which projected beyond the kerb. The act was accidental. *Held*, that the defendant was not liable.—*Harding* v. *Barker*, 37 W.R. 78.

(v.) **C. A.**—*Salary—Dismissal—Company.*—Previously to the registration of a company, A., by a written agreement with a trustee for the company, agreed to act as managing director at a salary of £800 per annum. The articles provided that A. should be the first managing director at a salary of £800 per annum, payable quarterly. An agreement between the company and A. was afterwards executed, by which the company adopted the former agreement. A. was dismissed for misconduct. *Held*, that the article was only an agreement between the shareholders regulating the way in which the payments should be made and the accounts kept, and that as the agreement between A. and the company provided for an annual payment of salary, A. was not entitled to salary for a quarter which had been completed before his dismissal.—*Boston Deep Sea Fishing and Ice Co.* v. *Ansell*, L.R. 39 Ch. D. 339; 59 L.T. 345.

(vi.) **C. A.**—*Wrongful Dismissal—Misconduct.*—Charges of misconduct having been made against the managing director of a company, the company dismissed him, and sued him for damages and accounts, alleging the misconduct. He counter-claimed for damages for wrongful dismissal. The original charges were not proved, but it was proved that he had received a commission from a person who had done work for the company. This was not discovered till after the commencement of the action. *Held*, that the receipt of the commission justified the dismissal, and that the company were not liable for damages, though they had failed to prove the grounds alleged for the dismissal, and though the commission had been received some time before the dismissal, and was an isolated case of misconduct.—*Boston Deep Sea Fishing and Ice Co.* v. *Ansell*, L.R. 39 Ch. D. 339; 59 L.T. 345.

Mayor's Court:—

(i.) **Q. B. D.**—*Certiorari—Removal into Superior Court.*—Rule 12 in the schedule to the Borough and Local Courts of Record Act, 1872, does not override sec. 17 of the Mayor's Court of London Procedure Act, 1857; and the discretion of a judge as to the removal of an action into the superior Court is not substituted by such rule for the strict limit of time imposed by that section.—*Price* v. *Shaw*, 59 L.T. 480.

(ii.) **C. A.**—*Jurisdiction—Cause of Action—Assignment of Debt—Mayor's Court Act*, 1857, *s.* 12.—Where a debt, incurred outside the jurisdiction of the Mayor's Court, is assigned within the jurisdiction, the assignment forms part of the cause of action on the debt by the assignee, and such action may therefore be brought in the Mayor's Court.—*Read* v. *Brown*, 58 L.J. Q.B. 14; 59 L.T. 605; 37 W.R. 131.

(iii.) **C. A.**—*Jurisdiction—Carry on Business.*—Decision of Q. B. D. (*see* Vol. **13**, p. 121, iv.) affirmed.—*Lewis* v. *Graham*, L.R. 22 Q.B.D. 1; 37 W.R. 73.

Mines:—

(iv.) **H. L.**—*Minerals—Purchase of Surface—Clay—Waterworks Clauses Act*, 1847.—The appellants, by virtue of the Waterworks Clauses Act, 1847, and a conveyance containing a reservation of the "whole coal and other minerals in the land in terms of the Waterworks Clauses Act, 1847," acquired from the respondents land for the purpose of erecting waterworks. *Held*, that the reservation did not include brick clay forming the surface or subsoil of the land.—*Lord Provost of Glasgow* v. *Farie*, L.R. 13 App. Cas. 657.

Mortgage:—

(v.) **Ch. D.**—*Assignment of Equity of Redemption—Action on Covenant against Mortgagor—Right to Reconveyance.*—A. mortgaged property to B. for £12,000, and covenanted to pay principal and interest. He afterwards sold his equity of redemption to C., who covenanted to indemnify A. in respect of the £12,000. C. made a further charge on the property in favour of B., and covenanted that the property should not be redeemable except on payment of both the £12,000 and the further charge. C. became insolvent, and B. sued A. on his covenant. *Held*, that B. was not entitled to recover except on terms of reconveying the mortgaged property to A. — *Kinnaird* v. *Trollope*, L.R. 39 Ch. D. 636; 57 L.J. Ch. 905; 59 L.T. 433; 37 W.R. 234.

(vi.) **C. A.**—*Building Agreement—Priority—Notice to Landlord.*—A company obtained a building agreement, by which they covenanted to build certain houses, a separate lease of each house when built to be granted to them. They executed a mortgage deed, by which they gave the mortgagees an equitable mortgage of their interest in the agreement, and covenanted to give legal mortgages by demise of the houses, when the leases had been granted. The mortgagees did not give notice to the freeholder. The company having obtained some of the leases, mortgaged them by deposit. *Held*, that it was not necessary for the first mortgagees to give notice to the freeholder in order to perfect their security, and that the omission to do so was not such negligence as to postpone them to the subsequent mortgagees by deposit.—*Union Bank of London* v. *Kent*, L.R. 39 Ch.D. 238; 57 L.J. Ch. 1022; 59 L.T. 714.

(vii.) **H. L.**—*Building Society—Second Mortgage—Tacking—Statute* 6 *&* 7 *Will.* IV., *c.* 32, *s.* 5.—A. mortgaged leaseholds to a building society. He then executed a second mortgage to X. He obtained an advance from Y., who paid off the building society, and received the mortgage deed

with the receipt indorsed, and the title deeds. Y. paid the balance of his advance to A., who executed a new mortgage including the whole advance. *Held*, that the effect of the statutory receipt was to vest the legal estate in Y., and that Y. was entitled to tack his further advance against X.—*Hosking* v. *Smith*, L.R. 13 App. Cas. 582; 59 L.T. 565.

(i.) **C. A.**—*Foreclosure — Order for Possession — R.S.C.* 1883, *O.* xviii., *r.* 2.—A foreclosure summons asked for delivery of possession in the event of foreclosure. The foreclosure order contained no directions as to delivery of possession. After the order was made absolute, *held*, that an order for delivery of possession might be made, and that the plaintiff ought not to be put to bring a new action.—*Keith* v. *Day*, L.R. 39 Ch. D. 452; 37 W.R. 242.

(ii.) **C. A.**—*Lease by Mortgagor—Notice to Pay Rent to Mortgagee—Mortgagee Entitled to Benefit of Covenants—Conveyancing Act*, 1881, *ss.* 10, 18.—A mortgagor in possession demised the property without the concurrence of the mortgagees. The lessee advanced money to the mortgagor on the terms that he should retain his rent until the debt was discharged. The mortgagees having given him notice to pay rent to them, he refused to do so. *Held*, that after giving such notice the mortgagees were entitled as reversioners to enforce the covenants of the lease, and to recover possession for non-payment of rent, and further, that the agreement as to the retention of the rent was not binding on the mortgagees. —*Municipal Permanent Investment Building Society* v. *Smith*, L.R. 22 Q.B.D. 70; 37 W.R. 42.

(iii.) **C. A.**—*Person Entitled to Redeem—Tenant for Years.*—Decision of Ch. D. (*see* Vol. 13, p. 122, iv.) affirmed.—*Tarn* v. *Turner*, L.R. 39 Ch. D. 456; 57 L.J. Ch. 1085; 59 L.T. 742.

(iv.) **C. A. & Ch. D.**—*Sale by Mortgagees—Purchase by Company—Mortgagee a Member.*—When mortgagees sell the mortgaged property to a public company, and the bargaining is real and honest, and conducted independently by the mortgagees on the one hand and the directors and officers of the company on the other, the sale will not be invalidated by the fact that one of the mortgagees subsequently agrees to become, and at the time of signing the formal contract is, a shareholder in, and the solicitor of the company.—*Farrar* v. *Farrar's, Limited*, 59 L.T. 619; 37 W.R. 196.

Negligence :—

(v.) **Q. B. D.**—*Collision of Vehicles—Action by Passenger—Both Drivers to Blame.*—In an action by a passenger in an omnibus against the owners of a tramway car for damages caused by collision between the omnibus and the car, the question for the jury is "was there negligence on the part of the tramway car driver which caused the accident." In case of an affirmative answer the plaintiff is not disentitled to recover because the omnibus driver was also negligent.—*Matthews* v. *London Street Tramways Co.*, 58 L.J. Q.B. 12.

Partnership :—

(vi.) **Ch. D.**—*Dissolution—Sale of Business—Receiver and Manager.*—The Court has jurisdiction to appoint a receiver and manager of a partnership business with a view to selling the business as a going concern, notwithstanding that the partnership has expired in pursuance of the provisions of the articles of partnership.—*Taylor* v. *Neate*, L.R. 39 Ch. D. 538; 57 L.J. Ch. 1044; 37 W.R. 190.

(i.) **C. A.**—*Mining Partnership—Bankruptcy of one Partner—Dissolution.*—The doctrine that the bankruptcy of one partner dissolves the partnership is applicable to mining partnerships.—*Dodds* v. *Preston*, 59 L.T. 718.

Patent:-

(ii.) **C. A.**—*Practice—Particulars of Objection—Court of Appeal—Patents, Designs, and Trade Marks Act*, 1883, *s.* 29, *sub-s.* (6).—In an action for infringement of a patent, the defendant disputed the validity of the patent, and delivered particulars of objection, in support of which he adduced evidence. At the trial the patent was upheld. On appeal this decision was reversed. *Held*, that the Court of Appeal could grant a certificate that the particulars of objection were reasonable and proper.—*Cole* v. *Saqui*, 37 W.R. 109.

(iii.) **C. A.**—*Provisional Specification—Complete Specification—"Distinct Statement of the Invention"—Patents, Designs, and Trade Marks Act*, 1883, *s.* 5, *sub-ss.* 3, 4. 5.—The provision that a complete specification must end with a distinct statement of the invention claimed, is only directory, and letters patent, when granted, will not be invalid because it has not been complied with. A patent is not invalid because the complete specification describes something different from anything specifically referred to in the provisional specification, provided, that what is so described comes within the nature of the invention described in general terms in the provisional specification.—*Siddell* v. *Vickers*, L.R. 39 Ch. D. 92; 59 L.T. 575.

Police Magistrate:—

(iv.) **Q. B. D.**—*Metropolis—Order for Delivery of Goods—Dog—2 & 3 Vict.*, *c.* 71, *s.* 40.—A Metropolitan Police Magistrate may make an order for a dog to be delivered to its owner.—*Reg.* v. *Slade*, L.R. 21 Q.B.D. 433; 57 L.J. M.C. 120; 59 L.T. 640; 37 W.R. 141.

Poor Law:—

(v.) **Q.B.D.**—*Assistant Overseer—Election—Warrant of Justices—59 Geo. III.*, *c.* 12, *s.* 7.—After an assistant overseer has been elected by the vestry, the two justices who are empowered to appoint the officer by warrant have no power to inquire into the validity of the election.—*Reg.* v. *Shepley*, L.R. 22 Q.B.D. 96; 58 L.J. M.C. 6; 59 L.T. 696; 37 W.R. 27.

(vi.) **H. L.**—*Rating—Line Leased by Railway Companies.*—*See* Vol. **12**, p. 109, i. Case remitted to arbitrator for him to find what is the proper value of the appellants' railway, &c. Ordered, that upon his finding the case be brought up for further consideration—*North & South-Western Junction Ry.* v. *Brentford Union*, L.R. 13 App. Cas. 592.

(vii.) **C. A.**—*Settlement—Illegitimate Child—Poor Law Amendment Act*, 1834, *s.* 71—*Divided Parishes Act*, 1876, *s.* 35.—An illegitimate child was born after the Divided Parishes Act, 1876, came into operation. The mother married in 1878, and so acquired a derivative settlement. *Held*, that the child followed its mother's settlement till that became derivative, and that since then it was settled in the place of its birth, and that it did not keep from the first the settlement which its mother had at the time of its birth.—*Northwich Guardians* v. *St. Pancras Guardians*, 37 W.R. 206.

Practice:—

(viii.) **C. A.**—*Appeal—Admiralty—County Court—County Courts Act*, 1875, *s.* 10.—Where the Divisional Court has varied the order of a County Court in an Admiralty cause, an appeal may be made to the Court of Appeal without leave.—*The Lydia*, L.R. 14 P.D. 1; 37 W.R. 161.

(i.) **C. A. & Q. B. D.**—*Appeal—Time — Vacation Order—R.S.C.*, 1883, *O.* lii., *r.* 5; *O.* liv., *r.* 24.—An appeal from a decision in chambers by a vacation judge must be made on the eighth day after the decision, or on the first day on which a court shall sit to which an appeal can be made after the expiration of eight days from the decision.—*Steedman* v. *Hakim*, L.R. 22 Q.B.D. 16; 59 L.T. 607; 37 W.R. 208.

(ii.) **C. A.**—*Appeal—Time—Two Orders on same Day—R.S.C.*, 1883, *O.* lviii., *rr.* 15, 15*a*.—Where an order was made dismissing a summons to vary a certificate, and on the same day an order on further consideration was made founded on the certificate, and the orders were separately drawn up on consecutive days; *held*, that there was in substance one order only, and that the time for appealing was the time for appealing from the order on further consideration.—*Marsland* v. *Hole*, 59 L.T. 593; 37 W.R. 81.

(iii.) **C. A.**—*Attachment—R.S.C.*, 1883, *O.* xliv., *r.* 2.—An application in the Chancery Division for leave to issue a writ of attachment is not properly made by summons in chambers, but should be made in Court by motion.—*Davis* v. *Galmoyle*, L.R. 39 Ch. D. 322; 37 W.R. 227.

(iv.) **C. A.**—*Charging Order—R.S.C.*, 1883, *O.* xlvi., *rr.* 1, 3—1 *&* 2 *Vict.*, *c.* 110, *s.* 14—3 *&* 4 *Vict.*, *c.* 82, *s.* 1.—Decision of Q.B.D. (*see* Vol. **14**, p. 15, vi.) affirmed.—*Brereton* v. *Edwards*, L.R. 21 Q.B.D. 488; 37 W.R. 47.

(v.) **Ch. D.**—*Company—Reduction of Capital—"And Reduced"—Motion to Dispense with Words.*—Leave to dispense with the words "and reduced" in the title of a company after reduction of capital, will not be given without evidence. On a petition for such leave being presented without evidence, *held*, that an affidavit must be filed verifying the petition, and the matter mentioned to the Court again.—*Re Maxim Weston Electric Company*, 59 L.T. 722.

(vi.) **Ch. D.**—*Court Fees—Managers' Accounts—Percentage—Order of* 1884, *Schedule, Item* 72.—In the case of accounts rendered periodically in chambers by the manager of a business, a percentage is payable on the amounts found to have been received, and not in the amounts found to be due. If an account is merely lodged, and no further steps are taken with regard to it, no fee is payable.—*Dennis* v. *Crawshay*, L.R. 39 Ch. D. 552; 57 L.J. Ch. 923; 59 L.T. 598; 37 W.R. 25.

(vii.) **C. A.**—*Discovery by Defendant before Particulars.*—Where the plaintiffs may reasonably be supposed to be ignorant of the particulars of their claim, and the defendant to be aware of them, as where the executors of a wife are suing her husband to recover articles belonging to her separate estate, the Court will order the defendant to make discovery before the plaintiffs are required to deliver particulars of their demand. —*Millar* v. *Harper*, 57 L.J. Ch. 1091.

(viii.) **C. A.**—*Interrogatories—R.S.C.* 1883, *O.* xxxi., *r.* 1.—The plaintiff, executrix of A. sued the executor of H., alleging that H. had received £6,000 on trust for A., had invested it in securities returning at least 5 per cent. interest, and had applied the interest to his own purposes. The defendant, in his defence, stated that he was ignorant of the matters alleged. *Held*, that as the plaintiff was not seeking to follow the investments of the £6,000, the defendant was not bound to answer an interrogatory as to such investments, but was bound to answer as to the amount of interest received, as he did not admit the receipt of 5 per cent. interest. *Held*, also, that he was not bound to answer an interrogatory asking whether he had not been the confidential agent of H., and acquainted with all his affairs.—*Owen* v. *Morgan*, L.R. 39 Ch. D. 316; 37 W.R. 243

(i.) **H. L.**—*Divorce—Personal Service out of Jurisdiction—Affidavit—18 & 19 Vict., c. 42.*—The respondent in a divorce bill being out of the jurisdiction and the petitioner in poor circumstances, the House of Lords dispensed with the attendance of a witness to prove personal service of the bill and the several orders of the House on the respondent; and ordered that an affidavit proving such personal service, and sworn before the British minister or consul at the place where the respondent resided, should be deemed sufficient proof of such service.—*Joynt's Divorce Bill*, L.R. 13 App. Cas. 741.

(ii.) **P. D.**—*Divorce—Counter Charge of Adultery by Husband—Leave to Proceed without Co-respondent.—20 & 21 Vict., c. 85, s. 28—29 Vict., c. 32, s. 2.*—To a wife's petition for divorce the husband made a counter-charge of adultery, and asked for a divorce. Leave was given him to proceed without making a co-respondent, the question whether a man can be made a co-respondent in such a suit being reserved.—*Curling* v. *Curling*, L.R. 14 P.D. 13.

(iii.) **Ch. D.**—*Enrolment of Order of Scotch Court—Jurisdiction—Judgments Extension Act*, 1868, *s.* 3.—There is no authority either by statute or custom for making an order for the enrolment of a decree of the Court of Session sequestrating the estate of a company, appointing a judicial factor, and ordering delivery to him of the books of the company.—*In re Dundee Suburban Railway Co.*, 58 L.J. Ch. 5; 59 L.T. 720; 37 W.R. 50.

(iv.) **P. D.**—*Evidence—Affidavit giving no Address.*—On a motion to condemn a divorced wife in costs the Court refused to receive affidavits filed by her which gave no address or an illusory address, the wife at the time being in contempt for disobedience of an order to deliver up the children of the marriage.—*Hyde* v. *Hyde*, 59 L.T. 523.

(v.) **Q. B. D.**—*Joint Tort-feasors—Severance of Defence—Costs.*—After judgment against joint tort-feasors, where one defendant has severed after defence, and raised pleas without the consent of the other, the general costs should be taxed against both defendants jointly, but those of and incidental to the additional pleas should be taxed against the defendant raising such pleas.—*Stumm* v. *Dixon*, L.R. Q.B.D. 99; 37 W.R. 92.

(vi.) **P. D.**—*New Trial—Misdirection—Divorce—R.S.C.* 1883, *O.* xxxix., *r.* 3—A notice of motion for a new trial of a divorce action on the ground of misdirection must state in what manner the judge misdirected the jury.—*Taplin* v. *Taplin*, 37 W.R. 256.

(vii.) **Ch. D.**—*Originating Summons.*—The Court, in its discretion, will not decide on originating summons a claim which involves setting aside a release, but will require a writ to be issued.—*Kelson* v. *Ellis*, 37 W.R. 91.

(viii.) **Q. B. D.**—*Particulars—Libel.*—The plaintiff, a director of a company, brought an action for libel against a committee of shareholders for statements contained in a report drawn up and alleged to be maliciously published by them. *Held*, that the publication complained of clearly included publication to others than shareholders, and that the defendants were not entitled to particulars of the occasions of publication to persons other than shareholders.—*Gourand* v. *Fitzgerald*, 37 W.R. 55.

(ix.) **C. A.**—*Petition for Payment Out—Service.*—Some of the respondents to a petition for payment out of Court under the Trustee Relief Act were out of the jurisdiction. It appearing that the order sought would merely carry into full effect an order which had been recently obtained by such respondents, *held*, without deciding whether leave could be given to serve the petition out of the jurisdiction, that service on the

solicitors who had presented the petition on which the former order was made, and who were willing to accept service, would be sufficient.—*In re Jellard*, L.R. 39 Ch. D. 424.

(i.) **Ch. D.**—*Pleading—Amendment at Conclusion of Evidence.*—An allegation in the statement of claim was not denied in the defence. Evidence was, however, given by witnesses on both sides on the point, and some facts were proved inconsistent with the allegation. The plaintiff's counsel did not allude to the fact that the allegation was admitted till his reply. The defendant's counsel then asked leave to amend by traversing the allegation. *Held*, that leave ought not to be given, and that the defendant must be bound by the admission.—*Lowther* v. *Heaver*, 59 L.T. 631; 37 W.R. 55.

(ii.) **C. A.**—*Prohibition—Acquiescence.*—Except on the application of the Crown, the Court will not grant a writ of prohibition where the defect in the jurisdiction of the inferior Court depends on some fact in the knowledge of the applicant which he has neglected, without excuse, to bring to the notice of the inferior Court.—*Broad* v. *Perkins*, L.R. 21 Q.B.D. 533; 57 L.J. Q.B. 638; 37 W.R. 44.

(iii.) **C. A. & P. D.**—*Restitution of Conjugal Rights—Notice or Demand.*—The written demand required to be made on the party to be cited prior to the issue of a citation in a suit for the restitution of conjugal rights, must be made by the proposed petitioner and no one else. A demand made by the petitioner's solicitor at her request was held insufficient.—*Field* v. *Field*, 59 L.T. 560; 37 W.R. 134.

(iv.) **Q. B. D.**—*Specially Indorsed Writ—Assignment of Debt—R.S.C., 1883, O. iii., r. 6.*—A writ was indorsed with a claim for a sum of money due from the defendant to the plaintiff under an assignment. The assignment, which was set out, was a request to the defendant to pay to the plaintiff a sum due from the defendant to the assignor under an I.O.U. of a certain date, signed by the defendant. The circumstances under which the I.O.U. was originally given were not stated. *Held*, a sufficient special indorsement.—*Bickers* v. *Speight*, L.R. 22 Q.B.D. 7; 58 L.J. Q.B. 42; 37 W.R. 139.

(v.) **P. C.**—*Special Leave to Appeal—Concealment—Judge's Notes.*—Where special leave to appeal has been granted on a petition which improperly concealed the grounds on which leave to appeal had been refused by the Court below, nothing will be done to assist an appeal so instituted, and accordingly a subsequent petition that further evidence may be taken will be refused. Where a judge's notes are mere private memoranda, and are not taken in pursuance of any law or practice requiring them to be taken, they ought not to be placed before a Court of Appeal.—*Baudains* v. *Liquidators of Jersey Banking Co.*, L.R. 13 App. Cas. 832.

(vi.) **Ch. D.**—*Summons or Action—R.S.C.*, 1883, *O.* lv., *r.* 3 (*g*).—The plaintiff claimed, by action, that it might be determined whether the defendant was co-trustee with him of a settlement under which both had been appointed trustees, and that a new trustee should be appointed in place of the defendant. *Held*, that the relief could not have been obtained on an originating summons.—*Elworthy* v. *Harvey*, 37 W.R. 164.

(vii.) **C. A.**—*Striking Out Statement of Claim as Frivolous and Vexatious.*—A plaintiff sued to recover real estate as heir-at-law of a person who died in 1816, and alleged concealed fraud committed in 1816. The Court being of opinion, on the materials before it, that the allegations of fraud were fictitious, struck out the statement of claim as frivolous and vexatious.—*Lawrance* v. *Lord Norreys*, L.R. 39 Ch. D. 213; 59 L.T. 703.

(i.) **Q. B. D.**—*Frivolous and Vexatious Action—Order to Stay—Alternative.* —An action ought not to be stayed as frivolous and vexatious, with the alternative that the plaintiff may proceed on paying a sum into Court as security for the defendant's costs. An action for malicious prosecution ought not to be stayed as frivolous and vexatious on the ground that the defendant was the trustee in the plaintiff's bankruptcy, and that the alleged malicious prosecution had been undertaken by order of the Court.—*Mittens* v. *Foreman*, 58 L J. Q.B. 40.

Principal and Agent:—

(ii.) **C. A.**—*Manager of Company—Profits—Account for.*—The directors of the plaintiff company were allowed by its articles to do business with the company. The managing director was allowed by his agreement with the company to enter into any business not prejudicial to the company. As a shareholder in other companies he received under their articles bonuses on moneys earned by them for work done for the plaintiff company. *Held*, that he must account for such bonuses to the plaintiff company, though the plaintiff company could not itself have obtained them from the other companies.—*Boston Deep Sea Fishing and Ice Company* v. *Ansell*, L.R. 39 Ch. D. 339; 59 L.T. 345.

Proxy:—

(iii.) **Ch. D.**—*Form of Proxy—Date.*—The governors of a charity had to elect a member of the staff. They were entitled to vote by proxy. A proxy was executed, nominating W. "to vote for me and on my behalf in the election of an ophthalmic surgeon on the day of next." The date of the election was left in blank, and the proxy was intended to be used at an election wherein the contest was between E. and C. The election did not take place, but an election to the same post was afterwards held in which E. was opposed by another candidate, T. The proxy was filled up with the date of such election. *Held*, that it was rightly rejected. *Semble*, the date of the meeting at which a proxy is to be used may be filled up when ascertained and after execution.—*Howard* v. *Hill*, 37 W.R. 219.

Public Right of Way:—

(iv.) **H. L.**—*Evidence of User.*—In an action claiming a public right of way over a track or mountain pass, in a thinly populated district, the shortest route from B. to C., it appeared that the track had been used by the public on foot, and by drovers twice a year, driving sheep from a market at B. to one at C; that public subscriptions had been collected for a bridge in the line of the track; that some distance up the track there was an old milestone, and that a proprietor in planting trees had left room for the track. *Held*, that the amount of user was such as might have been expected if the track had been an admitted public way, and not the subject of mere tolerance, and that the evidence was sufficient to establish a public right of way.—*Macpherson* v. *Scottish Rights of Way and Recreation Society*, L.R. 13 App. Cas. 744.

Railway:—

(v.) **C. A.**—*Agreement between Companies to Refer Disputes to Arbitration—Railway Companies Arbitration Act*, 1859, *ss.* 4, 26.—Where there is an agreement between two railway companies to refer disputes to arbitration, the Court must, if either company insists on it, make an order for referring disputes in accordance with the agreement; but the Court has jurisdiction to deal with any dispute if neither party insists on such reference. Where an action between two companies has been adjudi-

cated on by the Court without either party insisting on such reference to arbitration, though the point had been raised by the defendant company on their pleadings, it is too late for the defendants, being unsuccessful, to raise, at the hearing of the appeal, the point that the dispute ought to have been referred.—*L.C. & D.Ry.* v. *S.E.Ry.*, 37 W.R. 65.

(i.) **Q. B. D.**—*Cloak-room—Condition on Ticket—Loss—Misdelivery.*—A cloak-room ticket contained a condition that the company should not be answerable for the "loss" of any article exceeding the value of £5, unless the value should be declared. The condition followed the words of the Railway and Canal Traffic Act, 1854, sec. 7. The plaintiff's property, which exceeded £5 in value, was delivered to the wrong person. *Held*, that the word "loss" included misdelivery, and that the defendants were not liable.—*Skipwith* v. *G.W.Ry.*, 59 L.T. 520.

(ii.) **C. A.**—*Debenture Holders—Surplus Lands—Railway Companies' Act*, 1867, *s.* 23.—Decision of Ch. D. (*see* Vol. 13, p. 132, ii.) affirmed.—*In re Hull, Barnsley, &c., Ry. Co.*, 37 W.R. 145.

(iii.) **C. A.**—*Level Crossing—Obligation to Fence in Railway—Railways Clauses Act*, 1845, *s.* 47.—The large gates at a level crossing were sufficiently wide to cover the entire width of the metalled road and to fence in the line therefrom. There was a small gate for foot passengers at the side of the large gate, beyond the width of the metalled road, but communicating therewith by a short footpath. The plaintiff's horses, straying on the highway, passed along the footpath, and pushed against the fence adjoining such small gate, and, owing to the defective condition of such fence, got through on to the line and were killed. *Held*, that the company had not fulfilled their obligation to fence in the line, and were liable for the loss of the horses.—*Charman* v. *S.E.Ry.*, L.R. 21 Q.B.D. 524; 57 L.J. Q.B. 597; 37 W.R. 8.

(iv.) **C. A.**—*Negligence—Engine at Station—Noise of Steam.*—On leaving a station of the defendants a horse was frightened by an engine at the station blowing off steam, and damage was occasioned. The engine was not defective or improperly used, nor was the approach to the station inconvenient. *Held*, that the defendants were not liable, as there was no evidence of any obligation on their part to screen off the railway from the road.—*Simkin* v. *L. & N.W.Ry.*, L.R. 21 Q.B.D. 453.

(v.) **Ch. D.**—*Undue Preference—Railway and Canal Traffic Act*, 1854, *s.* 2—*Dock Company.*—The provisions against undue preference in the Railway and Canal Traffic Act, 1854, are confined to railway traffic; therefore the railway commissioners have no power to entertain charges against a railway and dock company in respect of inequality of dues charged at docks not connected with the company's railway, although the company are the owners of other docks which are connected with their railway.—*East and West India Dock Co.* v. *Shaw*, L.R. 39 Ch. D. 524; 57 L.J. Ch. 1038.

Restraint of Trade:—

(vi.) **Ch. D.**—*Receiver of Business—Soliciting Orders.*—A business was carried on under the order of the Court by a receiver and manager for ten years. *Held*, that the receiver and manager could not be restrained, in case of a sale of the business, from soliciting orders from or doing business with the customers.—*Irish* v. *Irish*, L.R. 40 Ch. D. 49; 37 W.R. 231.

Revenue:—

(i.) **Q. B. D.**—*Excise—Penalty—Second Offence—7 & 8 Geo. IV., c. 53, s. 78 —Summary Jurisdiction Act,* 1879, *s.* 4.—On a summons for keeping a dog without a licence, where a previous conviction is proved at the hearing, though not charged in the summons, the magistrate is not entitled to reduce the fine to less than one-fourth of the full amount.—*Murray* v. *Thompson*, 37 W.R. 221.

(ii.) **Q. B. D.**—*Income Tax—Clergyman—Gift by Society.*—A gift made by a charitable society to a clergyman, not in respect of his services, but as being poor and deserving, is not assessable to income-tax.—*Turner* v. *Cuxon*, 37 W.R. 254.

(iii.) **Q. B. D.**—*Income Tax — Inhabited House Duty — Exemption — "Hospital"*—5 *& 6 Vict., c.* 35, *s.* 61, *rule No.* vi.—48 *Geo.* III., *c.* 55, *Sched. B., Case* iv.—An institution for the reception of insane persons is not exempt from income tax or inhabited house duty as a "hospital" unless it is wholly or in part maintained by charity, although it may have been founded by charitable donations, and although some of the patients are maintained gratuitously, and any surplus from the payments of other patients is expended in enlarging and improving the institution.—*Needham* v. *Bowers*, L.R. 21 Q.B.D. 436; 59 L.T. 404; 37 W.R. 125.

(iv.) **C. A.**—*Income Tax—Sea Wall—Deduction for*—16 *&* 17 *Vict., c.* 34, *s.* 37. —Decision of Q.B.D. (*see* Vol. **13**, p. 76, iii.) affirmed.—*Hesketh* v. *Bray*, L.R. 21 Q.B.D. 444; 57 L.J. Q.B. 633; 37 W.R. 22.

(v.) **Q. B. D.**—*Succession Duty—Covenant to Pay during Life or within One Month after Decease—Succession Duty Act,* 1853, *s.* 2.—By deed dated in 1866, M. conveyed lands to trustees and covenanted that he, during his lifetime, or his executors within one month after his decease, should transfer certain stock and shares to the trustees. The transfer was not made during M.'s lifetime, but was made by his executors within one month after his decease. *Held*, that the covenant by M. was a "disposition" of property, and that succession duty was payable on the stock and shares so transferred.—*A. G.* v. *Montefiore*, L.R. 21 Q.B.D. 461; 59 L.T. 534; 37 W.R. 237.

(vi.) **Q. B. D.**—*Succession Duty—Accleration of Succession—Succession Duty Act,* 1853, *s.* 15.—By a marriage settlement, dated 1827, trusts were declared in favour of the husband and wife successively for their lives, with remainder for the issue of the marriage in such shares as the tenants for life should appoint, and in default of appointment in equal shares. There was a power for the trustees, with the consent of the tenants for life, to raise and apply any part of the then expectant share of any child or issue for the benefit of such child or issue. Appointments of different sums were made out of the trust funds to certain of the children, and the trustees, in the exercise of their discretion, and with the consent of the tenants for life, raised and applied such sums for the benefit of the respective children. *Held*, that on the death of the surviving tenant for life duty was payable on such sums, as on a succession which had been accelerated by the extinction of the prior interests.—*E.p. Sitwell; re Drury Lowe's Settlement*, L.R. 21 Q.B.D. 566; 37 W.R. 238; 59 L.T. 539.

Reversion:—

(vii.) **Ch. D.**—*Sale of—Unfair Bargain—Premiums on Life Assurance—Acquiescence.*—Where a reversion is sold by a poor and ignorant man, without independent advice, the onus of proving fairness is on the purchaser, and if the sale was at a considerable undervalue, the Court

will set aside the transaction. The purchaser of a contingent reversion insured, for his own protection, the life of the vendor. *Held*, that on the sale being set aside, he was not entitled to be repaid the premiums. —*Fry* v. *Lane; Whittet* v. *Bush*, 37 W.R. 135.

Settled Estate:—

(i.) **Ch. D.**—*Application of Corpus in Repairs—Jurisdiction—Originating Summons.*—The Court can, under its original jurisdiction, sanction the outlay of part of the corpus of trust funds on the repairs of the property, such outlay being necessary for the preservation of the property. The jurisdiction may be exercised on originating summons.—*Conway* v. *Fenton*, 37 W.R. 156.

Settled Land:—

(ii.) **C. A.**—*Payment out of Court—Person Absolutely Entitled—Trustee for Sale—Settled Land Act*, 1882, *ss.* 21 (9), 32—*Lands Clauses Act*, 1845, *s.* 69.—The Court has jurisdiction to order the purchase money of lands which has been paid into Court under the Lands Clauses Act, to be paid out to trustees for sale. The jurisdiction is discretionary, and the Court of Appeal refused to interfere with the discretion of a judge who had refused to exercise it. *Quære*, whether the Court has similar jurisdiction under sec. 69 of the Lands Clauses Act.—*E. p. L. & N.W.Ry.; in re Smith*, 37 W.R. 199.

(iii.) **Ch. D.**—*Sale by Tenant for Life—Costs of Mortgagee—Settled Land Act*, 1882, *ss.* 20, 21, 50.—Where a tenant for life mortgages his life interest in settled land, and then sells the land under the powers of the Settled Land Act, 1882, the mortgagee concurring in the sale, such concurrence is not an exercise of any of the powers, or an execution of any of the provisions of the Act, and the costs of the mortgagee ought not to be paid out of the proceeds of sale.—*Cardigan* v. *Curzon-Howe*, 37 W.R. 245.

Settlement:—

(iv.) **C. A.**—*After-acquired Property—Validity—Policy of Insurance—Condition Against Assignment.*—By a marriage settlement the settlor covenanted to settle any property of or to which he should at any time during the marriage become possessed or entitled by devise, bequest, purchase, or otherwise. *Held*, that the covenant was divisible, and was capable of enforcement as to any "property" of or to which the settlor should become possessed or entitled by "purchase." *Held*, also, that shares and life policies were such "property." An accidental death policy was subject to a condition that it "should not be assignable in any case whatever," and to a proviso that the insurance company should not be bound to recognise any equitable dealings with the policy. *Held*, that the effect of the condition was only to make the policy non-assignable at law, and that the policy-holder could deal with the beneficial interest in it, and a Court of Equity would enforce such a transaction.—*In re Turcan*, L.R. 40 Ch. D. 5; 59 L.T. 712; 37 W.R. 70.

(v.) **Ch. D.**—*After-acquired Property—Covenant to Settle—Exception of Property Settled by Instrument Under which it was Derived.*—A marriage settlement, made after the Married Women's Property Act, 1870, came into force, contained a covenant for the settlement of after-acquired property, excepting any property which might be settled by the instrument under which it was derived. A sum of money was appointed to the wife by an indenture which declared that such sum should be for her sole and separate use, and should not be subject to any trust or agreement for settlement contained in any marriage settlement. *Held*, that such sum was within the exception.—*Berens* v. *Benyon*, 59 L.T. 626.

(i.) **Ch. D.**—*Forfeiture—Life Interest—"Assigns."*—By a marriage settlement the income of the trust-fund was given to the husband "and his assigns" for his life, or until he should assign, charge, or incumber the same, or until he should be declared bankrupt, or take the benefit of any Act for the benefit of insolvent debtors, or until he should make an assignment for the benefit of his creditors. Judgments were signed against the husband, and charging orders were made against his life-interest in stock part of the trust fund. He afterwards mortgaged his life-interest. *Held*, that the mortgage determined his life-interest, and that the charging orders were good against the income up to the date of the mortgage.—*West* v. *Turner*, 59 L.T. 194.

(ii.) **Ch. D.**—*Perpetuity—Appointment—Ratification of Settlement.*—Under a marriage settlement, executed in 1834, the husband, C., had, in the events which happened, a power to appoint the intended wife's property among the children. The intended wife was an infant, and it was covenanted that when she attained twenty-one her real estate should be conveyed to the uses of the settlement. In 1836, after she had attained twenty-one, and after the birth of A., a daughter, she conveyed her real estate to the uses of the settlement. C., by his will, appointed the property equally to his three daughters, subject to a proviso that, if any of them should be unmarried at his death, her share should be in trust for her separate use for life, with remainder, if she left issue, as she should appoint, and, in default of appointment, or if she left no issue, upon similar trusts for his other children. A. was unmarried at his death. *Held* (1) that the wife's estate was settled in 1834, not in 1836; (2), that the trusts of the proviso were inseparable, and were void for remoteness, and that A. took her share absolutely, discharged from the proviso.—*Cooke* v. *Cooke*, 59 L.T. 693.

Ship :—

(iii.) **C. A.**—*Collision—Consequential Damages—Agreement for Employment.*—Where the owner of a vessel injured by collision has made an agreement for its future employment, the damages for collision must be estimated at the sum which a vessel of the description of the injured vessel might fairly be expected to earn, having regard to the agreement. Evidence as to the profits made by a substituted vessel is inadmissible.—*The Argentino*, L.R. 13 P.D. 191; 58 L.J. P. 1; 37 W.R. 210.

(iv.) **H. L.**—*Insurance—"In Port."*—A ship insured for a voyage to any port of discharge in the United Kingdom, "and whilst in port during thirty days after arrival," arrived at Greenock and discharged cargo. Within thirty days after arrival she left for Glasgow to proceed on a new voyage, and after reaching the fairway of the Clyde, about 500 feet from the harbour works, she was capsized. *Held*, that she was no longer "in port," and that the underwriters were not liable.—*Hunter* v. *Northern Marine Insurance Co.*, L.R. 13 App. Cas. 717.

(v.) **H. L.**—*Mersey Dock Acts Consolidation Act*, 1858, s. 230—*Dock Rates.*—Decision of C. A. (*see* Vol. **12**, p. 117, vi.), reversed, it being held that the vessels in question were liable as "trading outwards" to, and "inwards" from, India.—*Mersey Docks Board* v. *Henderson*, L.R. 13 App. Cas. 595; 59 L.T. 697.

(vi.) **P. D.**—*Salvage—Award.*—A vessel being on a rock in the Red Sea, the master and part of the crew went to Aden for assistance. During their absence the remainder of the crew were driven off by Arabs, but the vessel was not permanently abandoned. Three steamers succeeded

in getting her off, and saving part of her cargo. The value of the vessel was taken as £3,750. *Held*, that £2,000 ought to be given as salvage.—*The Erato*, L.R. 13 P.D. 163; 57 L.J. P. 107.

(i.) **P. D.**—*Salvage—Duty to Deliver Vessel.*—When salvors have brought the salved vessel into a position of safety they are bound to deliver up possession on demand of the owners, and have no right to retain the vessel for the alleged purpose of repairing her. *Semble*, that the salvors may be entitled to refuse to deliver up possession if at the time of the demand their operations are not so far completed as to have put the vessel into a position of safety.—*The Pinnas*, 59 L.T. 526.

(ii.) **P. D.**—*Salvage—Pilotage.*—The plaintiff's fishing-smack fell in with the defendant's vessel in the North Sea shewing a Jack in the rigging. The crew of the defendant's vessel were ill, and suffering from frost bite. Her captain requested to be piloted to the nearest port, the vessel not being in pilotage waters. The plaintiff's smack piloted her to Yarmouth. *Held*, that salvage services had been rendered. — *The Aglaia*, L.R. 13 P.D. 160; 57 L.J. P. 106; 59 L.T. 528; 37 W.R. 255.

(iii.) **P. D.**—*Salvage—Queen's Ship.*—The commander and crew of a Queen's ship are entitled to salvage remuneration for salvage services rendered by them which are outside the scope of their public duty.—*Ulysses* (*Cargo ex*), L.R. 13 P. . 20[illegible] 58 L.J. P. 11.

(iv.) **P. D.**—*Salvage—Agreement to Attempt to Tow—Payment for Work Done.* The master of the defendant's ship, the value of which with cargo was £78,000, the ship being disabled, asked the master of the plaintiff's ship to tow him to G. The latter attempted to do so, but on the hawsers parting left the defendant's ship in a more dangerous position than she was in before. She was afterwards towed in by another vessel. *Held*, that the plaintiff's ship was not entitled to salvage, but to adequate remuneration for work done. £400 awarded. — *The Benlarig*, L.R. 13 P.D. 3.

(v.) **P. D.**—*Vessel Grounding of Necessity—Implied Representation by Wharfinger.*—The defendants, who were wharfingers, agreed that the plaintiff's vessel should unload at their wharf, and for that purpose be moored at their jetty so as to ground at low tide. The bottom was vested in the Conservators of the Thames. *Held*, that there was an implied representation by the defendants that they had taken reasonable care to ascertain that the bottom was fit for the vessel to ground on, and that they were liable for damage caused by the bottom being uneven.—*The Moorcock*, L.R. 13 P.D. 157; 58 L.J. P. 15; 37 W.R. 31.

Solicitor:—

(vi.) **Ch. D.**—*Costs—Taxation—Sale of Land out of Jurisdiction—General Order*, 1881, *Schedule II.*—The costs of the vendor's solicitor in respect of the sale of land outside the jurisdiction are not governed by the General Order, and the scale fee is not chargeable in respect of such a sale.—*In re Greville's Settlement*, 37 W.R. 150.

(vii.) **C. A.**—*Costs—Conducting Sale by Auction—Solicitor's Remuneration Order, Aug.*, 1882, *O.* 4, *r.* 11.—Solicitors were employed in relation to a sale by auction, the auctioneer being paid by the client a lump sum as remuneration. *Held*, that the solicitor was not entitled to any payment for work done in relation to the "conducting" of the sale, even though such work was not included in that for which the auctioneer was paid.—*Re Parker*, 59 L.T. 491.

(i.) **C. A.**—*Action on Bill of Costs—Taxation—R.S.C.* 1883, *O.* xiv., *r.* 1—*Form of Order.*—Where a solicitor sues on his bill of costs, and the defendant admits his liability and desires a taxation, the form of order on an application for liberty to sign judgment is—"It is ordered that the bill of costs on which the action is brought be referred to the taxing master, pursuant to the statute 6 & 7 Vict., c. 73, and that the plaintiff give credit at the time of taxation for all sums of money received by him from or on account of the defendant, and let the plaintiff be at liberty to sign judgment for the amount of the master's allocatur in the said taxation, and costs to be taxed."—*Smith* v. *Edwards*, L.R. 22 Q.B.D. 10; 37 W.R. 112.

(ii.) **Q. B. D.**—*Privilege—Address of Client—Absconded Bankrupt.*—A solicitor will not be compelled to disclose the address of a bankrupt who has absconded, when the bankrupt has communicated such address to him as a solicitor, in confidence, and for the purpose of being advised in the bankruptcy proceedings.—*E. p. Chief Official Receiver; in re Arnott*, 37 W.R. 223.

See Will, p. 57, iii.

Tithes:—

(iii.) **H. L.**—*Non-Payment—City of London Tithes—Limitation—Tithe Prescription Act*, 2 *&* 3 *Will. IV.*, *c.* 100, *s.* 1—*Statute of Limitations*, 3 *&* 4 *Will. IV.*, *c.* 27, *ss.* 1, 2.—A statute of Henry VII. provided that the inhabitants of the City of London should pay tithes yearly in respect of their houses. A lay impropriator of tithes in a parish in the city brought an action to recover tithes from the inhabitants of certain houses. It appeared that no tithes, or payments in lieu of tithes, had ever been paid in respect of those houses. *Held* (1), that apart from statute mere non-payment afforded no defence even against a lay impropriator; (2) that the Tithe Prescription Act gave no defence: (3) that the payments were "annuities or periodical sums of money charged upon land," and that the Statute of Limitations afforded a defence to the action.—*Payne* v. *Esdaile*, L.R. 13 App. Cas. 613; 59 L.T. 568.

Trade-Mark:—

(iv.) **Ch. D.**—*Sheffield Registry—Old Corporate Mark—Jurisdiction—Patents, Designs, and Trade Marks Act*, 1883, *ss.* 81, 90.—The registration by the Cutlers' Company of old marks is a ministerial duty. *Held*, that the company had acted rightly in registering, on the application of L., an old corporate mark of which he was *primâ facie* owner, notwithstanding a notice of opposition from W., and without hearing W. *Held*, also, that there was no appeal to the comptroller.—*In re Lambert's Trade Mark*, 37 W.R. 154.

Trover:—

(v.) **C. A.**—*Negotiable Securities—Holder for Value*—Negotiable securities were stolen from the defendants by their manager, and came into the possession of the plaintiffs for value and without notice of fraud. The manager afterwards obtained the securities from the plaintiffs by fraud, and returned them to the defendants, who were not aware that the securities had ever been out of their possession. Some of the securities returned were not the actual securities stolen, but others of a like kind and value. *Held*, that in the absence of evidence to the contrary, the defendants ought to be presumed to have accepted the securities in discharge of their manager's obligation to restore them, and were

therefore *bonâ fide* holders for value, and entitled to retain them. Decision of Q. B. D. (*see* Vol. **13**, p. 80, ii.) affirmed.—*London and County Bank* v. *London and River Plate Bank*, L.R. 21 Q.B.D. 535; 57 L.J. Q.B. 601; 37 W.R. 89.

Trustee: -

(i.) **C. A.**—*Appointment of New Trustees—Vesting Order—Trustee Act, 1850, ss.* 3, 5.—Settled funds consisted of a mortgage debt vested in two trustees, and a sum of consols in their names. One trustee was lunatic, and the other out of the jurisdiction. New trustees were appointed in their places under a power in the settlement. A petition was presented praying for an order reappointing the new trustees, and vesting the trust property in them. The Court refused to reappoint them, but vested the mortgaged land in them, and vested the mortgage debt and the right to call for a transfer of the consols in the trustee out of the jurisdiction, and, it appearing that he was out of the jurisdiction, vested the debt and the right to call for a transfer in the new trustees.—*In re Batho*, L.R. 39 Ch. D. 189; 58 L.J. Ch. 32.

(ii.) **C. A.**—*Breach of Trust—Duty to Enforce Payment of Trust Fund.*—Decision of Ch. D. (*see* Vol. **14**, p. 22, ii.) affirmed.—*Billing* v. *Brogden*, 59 L.T. 650; 37 W.R. 84.

(iii.) **C. A.**—*Discretionary Trust for Maintenance—Assignable Interest.*—Direction by will to trustees, after the death of testator's widow, to apply the income of the estate in such manner as they should deem most expedient in or towards the maintenance, education, or advancement of the testator's children, until the youngest should attain twenty-one, and then to divide the capital. After the death of the widow, there being children under twenty-one, A., a child who had attained twenty-one, assigned all his interest under the will to X. *Held*, that no child was entitled, prior to the youngest child attaining twenty-one, to any part of the income, and that X. was entitled to no interest in the income except such moneys or property, if any, as might be paid or delivered, or appropriated for payment or delivery, by the trustees to A., and that the trustees could not pay or deliver to A. money forming part of the income or goods purchased out of it, inasmuch as the same would pass by the assignment.—*Henry* v. *Strong*, L.R. 39 Ch. D. 443.

(iv.) **H. L.**—*Investment—Loan—Immunity Clause.*—A will empowered the trustees to lend on such securities, "heritable or personal," as they might think proper, and contained a declaration that they should not be liable for "omissions, errors, or neglect of management." They sold a house, part of the trust property, to X., one of the beneficiaries. He was unable to pay the whole price, and a portion was left on loan. X. gave as security three houses, including those purchased from the trustees, upon each of which there were prior incumbrances to an amount exceeding two-thirds of their value as stated by X. He also gave the personal obligation of himself and his father-in-law, both of whom were in trade. X. and his father-in-law became bankrupt, and a loss was occasioned to the trust. *Held*, that the trustees were liable, on the ground that they had acted with partiality towards X., and had not shown ordinary care and prudence.—*Knox* v. *Mackinnon*, L.R. 13 App. Cas. 753.

(v.) **Ch. D.**—*New Trustees—Duties—Notice of Incumbrance—Dealing with Trust Funds.*—New trustees ought to inform themselves of the nature and amount of the trust property, and to look into the trust documents to see what incumbrances their predecessors had notice of. But if

there was nothing in such documents to give them notice of an incumbrance, they are not liable for loss occasioned by their ignorance of it, although in fact they did not look into the documents.—*Hallows* v. *Lloyd*, L.R. 39 Ch. D. 686; 59 L.T. 603; 37 W.R. 12.

(i.) **C. A.**—*Payment into Court—Costs—Trustee Relief Act.*—In an application for payment out of a fund paid into Court under the Trustee Relief Act, the jurisdiction of the Court is limited to the fund actually in Court, and the trustees cannot be ordered to repay the costs and expenses deducted by them before payment. If such deductions have been improperly made, separate proceedings must be taken to recover them.—*In re Parker's Will*, L.R. 39 Ch. D. 303; 58 L.J. Ch. 23.

(ii.) **C. A.**—*Purchase of Trust Property by Stranger—Re-purchase by Trustee—Onus of Proof.*—Decision of Ch. D. (*see* Vol. **13**, p. 138, v.) reversed.—*Postlethwaite* v. *Rickman*, 37 W.R. 200.

(iii.) **C. A.**—*Vesting Order—Refusal to Convey—Trustee Extension Act*, 1852, *s.* 2.—Where the title of a person requiring a conveyance of land is not free from doubt there is no "wilful" refusal to convey by the trustee in whom the land is vested, and therefore there is no jurisdiction to grant a vesting order.—*In re Mills' Trusts*, L.R. 40 Ch. D. 14; 37 W.R. 81.

See Costs, p. 35, vi.

Vendor and Purchaser:—

(iv.) **C. A.**—*Misdescription—Lease—Underlease.*—A condition in a contract for sale that "the description of the property in the particulars is believed to be correct, but if any error shall be found therein the same shall not annul the sale," refers to a misdescription of the corporeal property, not to a mistake in the statement of the vendor's title. Houses were stated in the particulars to be held for ninety years from the 24th of June, 1844. The conditions provided that the title should commence "with the lease under which the vendor holds dated July, 1845." The vendor was, in fact, entitled to an underlease for the residue of the term of ninety years less two days at a peppercorn rent, and the owner of the two days could not be found. *Held*, that the purchaser could not be compelled to accept a title to an underlease, the particulars having stated that the property was held by lease.—*In re Beyfus and Master's Contract*, L.R. 39 Ch. D. 110; 59 L.T. 740.

(v.) **Ch. D.**—*Misdescription—Measure of Compensation.*—Particulars of sale described land as "approached by C. Avenue, a new road, made up and sewered, which is continued across the property," and the plan showed C. Avenue as continued across the property. It turned out that the road across the property was not made up and sewered like C. Avenue. *Held*, that there was a misdescription, and that the measure of compensation was not the sum which it would cost to make up and sewer the road, but the difference between the value of the property as it was at the date of the sale, and as it would have been at that date if the road had been made up and sewered.—*Chifferiel* v. *Watson*, L.R. 40 Ch. D. 45; 37 W.R. 120.

(vi.) **Ch. D.** — *Misleading Particulars — Business Premises—Restrictive Covenant—Summons—Vendor and Purchaser Act*, 1874, *s.* 9.—A purchaser contracted to purchase premises described in the particulars as business premises. It turned out that they were subject to a covenant which seriously restricted the use of them. *Held*, on a summons that the title, although shown in accordance with the contract, was not

such as the purchaser ought to be compelled to accept. The Court refused to order a return of the deposit, but left the purchaser to his remedy by action.—*In re Davis and Carey's Contract*, 37 W.R. 217.

(i.) **Ch. D.** — *Sale by Agent—Want of Authority—Ratification.*—S., a director of a company, contracted on behalf of the company to sell to the defendant land of the company. The defendant failed to complete, and the company commenced an action to enforce the contract. *Held*, that the commencement of the action was a sufficient ratification of S.'s act to entitle the company to specific performance, even if S.'s authority had at the time of the contract been defective.—*Bolton Partners* v. *Lambert*, 37 W.R. 236.

(ii.) **Ch. D.**—*Sale of Surplus Lands by Railway Company—Absolute Sale.*—A railway company sold surplus land to T., agreeing that the payment of part of the purchase-money should be postponed to a date which was beyond the period prescribed for the sale of surplus land. The company was, by the deed carrying out the agreement, to have a lien on the land until payment. *Quære*, whether this was an absolute sale. T. having agreed to sell the land to Y., *held*, on a summons under the Vendor and Purchaser Act, 1874, that the Court would not enforce the contract.—*In re Thackwray & Young's Contract*, L.R. 40 Ch. D. 34; 37 W.R. 74.

Will:—

(iii.) **C. A.**—*Attesting Witness — Allowance of Profit-costs to Solicitor—Trustee—Wills Act*, 1837, *s.* 15.—A declaration in a will that a solicitor, who is executor and trustee, may charge profit-costs for work done for the estate, is a beneficial gift to him, and is void if he witnesses the execution of the will.—*In re Pooley*, L.R. 40 Ch. D. 1; 58 L.J. Ch. 1; 37 W.R. 17.

(iv.) **Ch. D.**—*Construction—Children—Gift Over—Illegitimate Child.*—A testator devised an estate to his "eldest daughter" A. He directed that "should any of my children die without having children of their own lawfully begotten, their share shall be divided equally among my surviving children." A. was illegitimate. On her death intestate and without having had issue the Crown claimed the estate devised to her. *Held*, that she was included among "children" in the gift over, and that the surviving children of the testator were entitled.—*Smith* v. *Jobson*, 59, L.T. 397.

(v.) **C. A.**—*Construction—"Die Without Leaving Issue."*—Decision of Ch. D. (*see* Vol. **13**, p. 58, vii.) affirmed.—*Slattery* v. *Ball*, L.R. 40 Ch. 11; 37 W.R. 37.

(vi.) **P. C.**—*Construction—Die Without Leaving Issue.*—A testator, after making certain dispositions during the lifetime of his widow, and certain absolute dispositions in favour of his children, to be effected by conveyance from the trustees of the will after the decease of his wife, directed that "if any of my said children shall die without leaving lawful issue them surviving, the property hereby devised to each of my said children shall be divided amongst my surviving children." *Held*, that according to the whole scope and intention of the will, the gift over was to take effect only on death without issue in the lifetime of the widow.—*Lewin* v. *Kelly*, L.R. 13 App. Cas. 783; 59 LT. 675.

(vii.) **Ch. D.**—*Construction—Discretionary Power to Invest—Implied Power to Sell Real Estate.*—A testator devised and bequeathed real and personal estate to trustees, and empowered them at their absolute discretion to continue the whole or any part of the estate in the firm in

which he was a partner, or "to invest, re-invest, and lend any part" of his estate to such firm on such terms as they should think proper. *Held*, that there was no implied power to sell real estate.—*Holloway* v. *Holloway*, 37 W.R. 77.

(i.) **C. A.**—*Construction—Divisible Gift—Remoteness.*—A will contained an ultimate limitation of real estate to the right heirs of the testatrix in case both her daughters (who were married) should die without leaving any child or the issue of any child living at the death of the survivor of them, or of the survivor of their respective then present or any future husbands. *Held*, that the gift could not be divided into two gifts (1) in case both daughters should die without leaving issue at their respective deaths, and (2) in case the daughters or either of them should die leaving issue, and there should be no such issue living at the death of the survivor of the husbands; but that the gift was a single gift over on one event involving two things, and was void for remoteness.—*Peek* v. *Savory*, L.R. 39 Ch. D. 289.

(ii.) **Ch. D.**—*Construction—Future Gift of Residue—Income Undisposed of—Power to Grant Jointure.*—Testatrix being entitled, under the marriage settlement of her grand-daughter and A., to a fund subject to the life interest of A., gave her "reversionary interest" in the fund on trust, on the determination of A.'s interest, for the children of A. by any future marriage. She gave a power "with or without power of revocation, or by will or codicil," to appoint the income to any future wife for life, and in default of children acquiring a vested interest she gave the fund to A. She also gave her residue in trust for A. By codicil she gave her residue on the same trusts in favour of A. and his issue as were declared in the will concerning the reversionary interest. A. married a second time. *Held*, that the income of the residue accruing during A.'s life must be accumulated for the benefit of the possible children of A. *Held*, also, that the power given to A. to appoint to a wife was of the nature of a power to grant a jointure, and that he could not appoint the income accruing during his life to his wife.—*Askin* v. *Ferguson*, 59 L.T. 462.

(iii.) **Ch. D.**—*Construction—Gift to "Personal Representatives" of Children "per stirpes."*—Gift of lands to trustees on trust to pay the rents unto and for the equal benefit of all the children of the testatrix and their respective families so long as any of her children should live; and from and after the death of the longest liver of her children she directed the trust estate to be sold, and the proceeds to be divided equally amongst all and every the "personal representatives" of her several children "per stirpes." *Held*, that under the ultimate gift the issue living at the death of the testatrix, and the issue born after her death and before the death of the longest liver of the children were entitled to share "per stirpes."—*Rainford* v. *Knowles*, 59 L.T. 359.

(iv.) **C. A.** — *Construction — Legacy — Condition—Limitation.* —Decision of Ch. D. (*see* Vol. **13**, p. 98, iii.) affirmed.—*Trafford* v. *Maconochie*, L.R. 39 Ch. D. 116; 57 L.J. Ch. 936; 59 L.T. 681; 37 W.R. 83.

(v.) **C. A.**—*Construction—"Other Sons"—"To be Begotten."*—Decision of Ch. D. (*see* Vol. **13**, p. 26, viii.) affirmed.—*Locke* v. *Dunlop*, L.R. 39 Ch. D. 387; 57 L.J. Ch. 1010; 59 L.T. 683.

(vi.) **C. A.**—*Construction—Precatory Trust.*—In considering whether precatory words create a trust, the Court will not look only to particular expressions, but will see whether on the whole will the intention was to create a trust, and regard will be had to any difficulty which would arise from a trust. Gift by a testatrix of all her real and personal property to

her daughter, "her heirs and assigns; and it is my desire that she allows to A. an annuity of £25 during her life; and that A. shall, if she desire it, have the use of such portions of my household furniture as may not be required by my daughter." *Held*, that no trust was created to pay the annuity.—*Gregory* v. *Edmondson*, L.R. 39 Ch. D. 253.

(i.) **Ch. D.** — *Construction — Remoteness — Person Past Child-bearing — Admissibility of Evidence.* —Bequest by testator on trust for his daughter A. for life, and after her death on trust for such of A.'s children as should attain the age of twenty-one, and also for such children of any son of A. who should die under twenty-one, as should live to attain the age of twenty-one. At the death of the testator, A. was over sixty years of age and had children. *Held*, that the trust for the grandchildren of A. was void for remoteness, and that evidence was not admissible to shew that at the testator's death A. was past the age of child-bearing.—*Johnston* v. *Hill*, L.R. 39 Ch. D. 155; 57 L.J. Ch. 1061; 59 L.T. 725; 37 W.R. 51.

(ii.) **C. A.**—*Construction—Resulting Trust.*—Devise to X., the testator's brother, of whatsoever real estate the testator might die possessed of, "on trust nevertheless to pay thereout the sum of £800 due from me to" A., and "the sum of £300 due from me to" B., "and also on trust to pay" certain annuities. There was a bequest of the personalty to X. and others, and X. was executor. *Held*, that the real estate was given to X. beneficially, subject to the payments mentioned. —*Croome* v. *Croome*, 59 L.T. 582.

(iii.) **Ch. D.**—*Construction—Special Power of Appointment.*—Testatrix had a power of appointment among her children over property settled on them in default of appointment. By her will she bequeathed and appointed her residuary estate, including all property over which she should at her death have any power of appointment, on trust, after payment of debts, &c., to apply so much of the income as the trustees should think fit during the minority and spinsterhood of her only child for her maintenance, and to accumulate the surplus; the whole, on such child attaining twenty-one or marrying, to be in trust for her for life, with remainders over. *Held*, that the power was not executed.—*Wood* v. *Cotton*, L.R. 40 Ch. D. 41; 37 W.R. 232.

(iv.) **C. A.**— *Construction — Provision for Grandchildren — Child Dying without leaving any Child him Surviving — Gift-over.* — There is no positive rule of law that, where provision is made for children or grandchildren in a settlement or will, the children or grandchildren who attain twenty-one or marry must take, notwithstanding an intention expressed to exclude children or grandchildren who do not survive their parents. But where the expressions in the instrument, indicating the intention to exclude, are ambiguous, the instrument ought not to be construed to exclude such children or grandchildren. Decision of Ch. D. (*see* Vol. **13**, p. 142, ii.) affirmed.—*Stephen* v. *Cunningham*, L.R. 39 Ch. D. 426; 59 L.T. 745; 37 W.R. 245.

(v.) **Ch. D.**—*Construction—"Wife"—Divorced Wife.*—Bequest on trust for the sons of testator for their lives, and after the decease of each son on trust to pay to any wife of such son, the income of his share for life. A son married, was divorced on his own petition, and died. *Held*, that the divorced wife was not entitled.—*Hitchins* v. *Morrieson*, L.R. 40 Ch. D. 30; 37 W.R. 91.

(vi.) **Ch. D.**—*Gift to Executors of Deceased Legatee—Residuary Gift by Legatee to Testator.*—A. bequeathed half of his residuary estate to B.,

and, in case of the decease of B., to B.'s executors and administrators. B. predeceased A., having bequeathed all her residuary estate to A. *Held*, that the share of A.'s estate bequeathed to B., and bequeathed by B. to A., went to A.'s next-of-kin as undisposed of.—*In re Valdez' Trusts*, 37 W.R. 162.

(i.) **C. A.**—*Repugnant Condition in Will.*—Decision of P.D. (see Vol. **14**, p. 11, ii.) affirmed.—*Corbett* v. *Corbett*, L.R. 14 P.D. 7; 37 W.R. 114.

(ii.) **P. A.**—*Satisfaction—Covenant to Pay—Legacy—Direction for Payment of Debts.*—Decision of Ch. D. (see Vol. **13**, p. 142, v.) affirmed.—*Horlock* v. *Wiggins*, L.R. 39 Ch. D. 142; 58 L.J. Ch. 46; 59 L.T. 710.

Quarterly Digest

OF

ALL REPORTED CASES,

IN THE

Law Reports, Law Journal Reports, Law Times Reports, and Weekly Reporter,

FOR FEBRUARY, MARCH, AND APRIL, 1889.

By C. H. LOMAX, M.A., of the Inner Temple, Barrister-at-Law.

Administration :—

(i.) **C. A.**—*Executors carrying on Testator's Business—Right of Indemnity—Right of Creditors—Priority of Creditors.*—Where executors, in pursuance of authority contained in their testator's will, carry on his business, they are entitled, in priority to the creditors of the testator, to be indemnified out of such part of the estate as they acquire in carrying on the business to the full amount of the debts and liabilities incurred in so doing, less any amount which they may owe the estate, and creditors having a claim against the executors personally are entitled, to the extent of such claim, to stand in their place in respect of such indemnity. The testator's creditors are entitled, as regards his original assets, to priority over the executors' claim to such indemnity, and the executors have no right of indemnity out of such assets, except for the expenses of realizing them, and the creditors of the executors in respect of the business have no claim against such assets.—*Dowse* v. *Gorton*, 60 L.T. 305; 37 W.R. 341.

(ii.) **Ch. D.**—*Set off by Executors—Undischarged Debtor—Close of Liquidation—Legacy—Bankruptcy Act*, 1869, *s.* 54.—B. proved for £600 in A.'s liquidation, but received no dividend. On 4th December, 1886, the liquidation was closed, but no discharge was granted to A. In January, 1888, B. died, leaving A. a legacy of £1,000. *Held*, that B.'s executors could not set off or retain the legacy, as there was no debt which could be enforced till three years after the close of the liquidation.—*Rees* v. *Rees*, 60 L.T. 260.

(iii.) **Ch. D.**—*Power of Administrator to Appropriate Part of Estate—Chose in Action—Mortgage Debt.*—An administrator, being one of the next-of-kin, may, without any agreement with the other next-of-kin, appropriate to his own share a chose in action, such as a mortgage debt, forming

part of the intestate's estate. Therefore where such appropriation was made, *held*, that interest paid by the mortgagor to the administrator, to his executrix, and to her administrator in succession, was paid to the persons entitled to receive it, and prevented the mortgagor from setting up the Statute of Limitations as a defence to a foreclosure action.—*Barclay* v. *Owen*, 60 L.T. 220.

(i.) **Ch. D.**—*Interest on Costs—Solicitors' Remuneration Act*, 1881, *General Order VII.*—*R.S.C.*, 1883, *O.* xli., *r.* 3; *O.* xlii., *r.* 16.—Interest on costs in an administration action ordered to be raised out of a fund is not payable without express provision to that effect contained in the order.—*Withington* v. *Neumann*, L.R. 40 Ch. D. 475; 58 L.J. Ch. 260.

(ii.) **P. D.**—*Amount of Administration Bond.*—The estate of A. was being administered in the Chancery Division. B., deceased, was entitled to a moiety of a share in such estate. The applicant, in order to complete the chain of representation to B., had taken out letters of administration to the estates of B., C. and D. The Chancery Division ordered that the share so belonging to B.'s estate should be paid directly to the persons entitled, and not through the applicant, his administratrix. *Held*, that the security to be given by the applicant in respect of the grants which she had taken out might be limited to twice the amount of her beneficial interest.—*In the Goods of Parton; in the Goods of Bennison*, L.R. 14 P.D. 40.

(iii.) **P. D.**—*Grant—Executor out of Jurisdiction—Guardian of Sole Legatee.*—One of two executors appointed by a will was dead, the other was in Brazil, the date of his return being uncertain. The sole legatee was a minor, whose next-of-kin either renounced or were out of the jurisdiction. There was urgent need of immediate administration. Administration with the will annexed was granted to the paternal aunt of the minor, whom she had elected her guardian.—*In the Goods of Batterbee*, L.R. 14 P.D. 89; 37 W.R. 416.

(iv.) **P. D.**—*Grant—Application to Pass over Widow—Citation.*—Application being made to grant letters of administration to the father of the intestate, passing over the widow, against whom misconduct was alleged, the Court refused to make the grant without citing the widow.—*In the Goods of Middleton*, L.R. 14 P.D. 23; 58 L.J. P. 28; 60 L.T. 237.

Appropriation of Payments :—

(v.) **Ch. D.**—*Banking Account—Trust Moneys.*—On the 6th of October a stockbroker paid into his banking account sums belonging to P. and S., his clients, and on that day the balance to his credit amounted to £500. Between that day and the 5th of November he paid in further sums belonging to clients, but on the latter day the balance amounted to £300 only, he having drawn out large sums for his own purposes. On the 5th of November a judgment creditor obtained a garnishee order against the balance. *Held*, that the moneys belonging to P. and S. had been drawn out before the 5th of November, and were not represented by any part of the balance.—*Hancock* v. *Smith*, 37 W.R. 459.

Arbitration :—

(vi.) **Ch. D.**—*Agreement to Refer—Discretion of Court—Common Law Procedure Act*, 1854, *s.* 11.—By their partnership articles the plaintiff and defendant agreed that all "pecuniary presents and gratuities from patients, and all other professional emoluments whatever" should be accounted for as profits of the business, and that all differences with regard to the construction of the articles should be referred to

arbitration. One of the patients attended by the plaintiff died, appointing him her executor, and leaving him a legacy and the residue of her estate. The defendant claimed the legacies as profits of the business, and required that the question should be referred to arbitration. The plaintiff issued a writ to have the question determined by the Court. *Held*, on a motion by the defendant to stay proceedings, that the question was within the agreement to refer, but that the Court had a discretion, and that the action ought not to be stayed.—*Lyon* v. *Johnson*, 60 L.T. 223; 37 W.R. 427.

(i.) **C. A. & Ch. D.**—*Public Health Act*, 1875, *s.* 180, *sub-s.* 9—*Time for Award of Umpire.*—Where an umpire is appointed in an arbitration under the Public Health Act, 1875, he must, unless he duly extends the time, make his award within twenty-one days. Two arbitrators, appointed in such an arbitration, on January 3 extended the time for making their award to February 20. On January 10, they appointed an umpire. On February 1, the umpire and the arbitrators held their first meeting, at which it became clear that the arbitraters could not agree, and one of them withdrew from the arbitration. *Held*, that the matter were referred to the umpire on February 1.—*In re Yeadon Waterworks Co. and Yeadon Local Board*, 59 L.T. 844; 37 W.R. 360.

See Insurance, p. 73, iii.

Attachment.—*See* Practice, p. 82, vi.

Banker:—

(ii.) **Q. B. D.**—*Moneys Entrusted for Collection—Trust.*—Where moneys are entrusted to a banker to collect and remit, a trust is created, and in the event of the banker's bankruptcy before they are remitted, payment may be demanded out of the estate.—*E. p. Plitt; in re Brown*, 37 W.R. 463.

Bankruptcy:—

(iii.) **Q. B. D.**—*Act of Bankruptcy—Deed of Arrangement—Deeds of Arrangement Act*, 1887, *ss.* 5, 17—*Bankruptcy Act*, 1883, *s.* 4, *sub-s.* 1 (*a*).—Although a deed of arrangement is void by reason of being unstamped and unregistered, it may be given in evidence, in proof of an act of bankruptcy committed by the debtor.—*E. p. Heapy; in re Hollinshead*, 60 L.T. 273; 37 W.R. 415.

(iv.) **Q. B. D.**—*Act of Bankruptcy—Notice of Suspension of Payment—Fraudulent Preference—Bankruptcy Act*, 1883, *s.* 4, *sub-ss. f. & h.*—The issue by a trader to his creditors of a circular, stating that his affairs have become embarrassed, and that before taking further action he wishes to confer with his creditors as to their position, is not notice "that he is about to suspend payment of his debts," although his bankers, to whom he is indebted, open a suspense account after receipt of the circular. A firm paid to their bankers accommodation bills, which falsely purported to be drawn in respect of goods accepted by a brother of a member of the firm. Before the bills became due, and shortly before their bankruptcy, the firm gave the bank cheques in exchange for the bills. *Held*, that the payment constituted a fraudulent preference.—*E. p. The Trustee; in re Fleming, Fraser & Co.*, 60 L.T. 154.

(v.) **Q. B. D.**—*Action between Bankrupts—Order by Consent—Costs—Rights of Trustee in Bankruptcy.*—While a partnership action was pending the parties thereto were both adjudicated bankrupt; and an order was made by consent, by which the receiver in the action was directed to tax and pay the costs, and pay over the balance in his hands

to the trustee in bankruptcy. *Held*, that the order authorized the receiver to pay the solicitors in the action their taxed costs, but that it was binding on the trustee only so far as he had assented to it.—*E. p. Peace; in re Chantry & Brewster*, 37 W.R. 352.

(i.) **Q. B. D.**—*Deed of Arrangement—Registration—Alteration—Deeds of Arrangement Act*, 1887, *ss.* 5, 6.—A deed of arrangement, to which the creditors were scheduled, had, at the time of registration, only one name in the schedule, the others being added afterwards. *Held*, that the trustee under the deed could not appeal against a receiving order made against the debtor, as a true copy of the deed had not been registered.—*E. p. Milne; in re Batten*, 60 L.T. 271; 37 W.R. 303.

(ii.) **Q. B. D.**—*Deed of Assignment—Assent obtained by Misrepresentation—Bankruptcy Act*, 1883.—Where a creditor is persuaded by misrepresentations to assent to the execution of a deed of assignment by the debtor, he will not be precluded from presenting a bankruptcy petition.—*E. p. Parrier; in re Tannenberg*, 60 L.T. 270; 37 W.R. 480.

(iii.) **C. A.**—*Disclaimer—Application for Vesting Order—Notices.*—On an application for a vesting order respecting leasehold property, the lessor and an assignee of the lease will generally be proper, but not always necessary parties. It is a question in each case for the discretion of the Court.—*In re Morgan; e. p. Morgan*, 37 W.R. 344.

(iv.) **Q. B. D.**—*Irish Bankruptcy Act*, 1857, *s.* 267—*Title of Assignees—Money paid to Bankrupt without Notice.*—Under the Irish Bankruptcy Act, 1857, the title of the assignees to all the bankrupt's property becomes complete on the adjudication, and a person who, after the adjudication, but without notice of it, pays to the bankrupt a debt owing to him, is not discharged by such payment.—*McEntire* v. *Potter*, L.R. 22 Q.B.D. 438.

(v.) **C. A.**—*Judgment—"Execution thereon not having been Stayed"—Bankruptcy Notice—Payment Prevented—Bankruptcy Act*, 1883, *s.* 4, *sub-s.* 1 (*g*).—R. obtained a judgment against D.; M. obtained a judgment against R.; R. served a bankruptcy notice on D. Before seven days had expired, M. served a garnishee order nisi on D. D. failed to pay either R. or M., and R. presented a bankruptcy petition against him. The garnishee order was made absolute, and a receiving order was made against D. *Held*, that execution on R.'s judgment against D. had not been stayed, and that the receiving order was rightly made. *Held*, also, that in the absence of evidence that D. would have paid R. if he had not been served with the garnishee order, R. was not prevented from treating the failure to comply with his bankruptcy notice as an act of bankruptcy.—*E. p. Dennis; in re Dennis*, 37 W.R. 263.

(vi.) **Q. B. D.**—*Order of Discharge—Suspension—Conditions—Bankruptcy Act*, 1883, *s.* 28, *sub-s.* 2.—The Court may not make an order of discharge conditional, and also suspend its operation.—*E. p. Huggins; in re Huggins*, L.R. 22 Q.B.D. 277; 58 L.J. Q.B. 207; 60 L.T. 236; 37 W.R. 432.

(vii.) **Q. B. D.**—*Trading by Undischarged Bankrupt—Property taken by Trustee—Right to Indemnity—Bankruptcy Act*, 1883, *s.* 44.—An undischarged bankrupt who trades without the knowledge of the trustee and acquires property, cannot, on the trustee becoming aware of the trading and taking the property acquired, claim an indemnity from the trustee against liabilities incurred during the trading. If he obtains the trustee's sanction to the trading he is his agent, and is entitled to an indemnity.—*E. p. Newton; in re Clarke*, 60 L.T. 335.

(i.) **Q. B. D.**—*Two Petitions—Dismissal of First—Costs.*—S., the debtor, at the request of certain creditors, among whom was R., executed a deed of assignment. R. presented a bankruptcy petition against S., founded on the deed. The debtor opposed the petition on the ground that R. had assented to the deed. Before completion of the hearing a creditor who had not assented to the deed presented a petition, on which a receiving order was made. *Held*, that as there was an available act of bankruptcy, the objection to R.'s petition was useless, and that R. ought not to be made to pay the costs, but that as R. ought not to have presented his petition he ought not to have any costs.—*E. p. Rooke; in re Smith*, 60 L.T. 192.

(ii.) **Q. B. D.**—*Trustee—Objection by Board of Trade—Bankruptcy Act*, 1883, *s.* 21.—B., an accountant, at the request of the principal creditors of S., who was in difficulties, undertook the management of his affairs. B. made and received payments on account of S.'s estate, and, with the consent of S., retained a remuneration for himself. S. became bankrupt, and B. was appointed trustee. The Board of Trade objected to the appointment. *Held*, that the objection must be sustained, as it was almost impossible for B. to act impartially with reference to questions which must arise out of his own dealings with the estates.—*E. p. the Board of Trade; in re Storold*, 60 L.T. 190.

See Banker, p. 63, ii. Champerty, p. 66, iv. Husband and Wife, p. 75, i. Mortgage, p. 80, iv. Practice, p. 82, viii.

Bill of Sale:—

(iii.) **C. A.**—*Consideration—Statement of—Bills of Sale Act*, 1878, *s.* 8.—The consideration for a bill of sale was stated to be the payment of a sum of money by the grantee to the grantor. Part of such sum was in fact retained by the grantee in satisfaction of (1) the amounts of acceptances which had been given by the grantor to the grantee, and were not yet due; (2) a sum agreed to be paid by the grantor to the grantee for the hire of furniture comprised in the bill of sale; and (3) an agreed sum for the expenses of the transaction. *Held*, that the consideration was not truly stated.—*Richardson* v. *Harris*, L.R. 22 Q B.D. 268; 37 W.R. 426.

(iv.) **Q. B. D.**—*Inventory with Receipt Attached—Bills of Sale Act*, 1878, s. 4.—The defendant's furniture was distrained by his landlord for rent due, and was sold by the landlord's broker to X., who immediately after the sale let it to the defendant's wife under a hiring agreement. The broker gave X. an inventory of the goods, with a receipt for the purchase-money attached. The goods were seized under a writ of *fi. fa.*, issued by the plaintiff. *Held*, that the inventory and the hiring agreement together constituted a bill of sale, and required registration. —*French* v. *Bombernard*, 60 L.T. 48.

(v.) **C. A.**—"*Inventory with Receipt Attached*"—"*Document not an Assurance.*"—*See* Vol. **14**, p. 3, vi. The goods of A. were seized by the sheriff under a writ issued by X., and were sold by the sheriff to X. by private contract. X. received from the sheriff an inventory with receipt attached. X. agreed to let the goods to A.'s wife, and A. remained in possession of them, till they were seized under a writ issued by the plaintiff. The County Court Judge, on an interpleader issue, found that there had been a complete transaction of purchase and sale, irrespective of the inventory. *Held*, that there was evidence to justify this finding, and that the inventory was not an assurance which required registration.—*Haydon* v. *Brown*, 59 L.T. 810.

(i.) **Q. B. D.**—*Mortgage—Trade Machinery—Bills of Sale Act*, 1878, *ss*. 4, 5, 7.—A. deposited with X. the documents of title relating to property on which was trade machinery, with a memorandum acknowledging the right of X. to an assignment of such property, either absolutely or by way of mortgage, to secure the repayment of moneys provided by X. for the purchase of the property, and stating that until such election should be exercised the documents were deposited as an equitable mortgage. *Held*, that the memorandum was not a bill of sale with respect to the trade machinery.—*E. p. Lusty; in re Lusty*, 60 L.T. 160; 37 W.R. 304.

Bombay Civil Fund :—

(ii.) **C. A.**—*Bombay Civil Fund Act*, 1882—*Statutory Jurisdiction—Costs.*—The Court of Appeal having statutory jurisdiction to determine any question between a subscriber to the fund and the Secretary of State for India, with reference to the liability of the fund, and there being no provision in the Act as to costs, can order a subscriber who has taken proceedings to enforce a claim against the fund which the Court holds not to be established, to pay the costs of such proceedings.—*Pringle* v. *Secretary of State for India*, L.R. 40 Ch. D. 288.

Bond :—

(iii.) **Q. B. D.**—*Accord and Satisfaction—Co-obligees.*—Where there are two co-obligees to a bond, the presumption of equity is that they are tenants in common, and not joint tenants, of the debt and of any security held for it; and unless this presumption is rebutted, accord and satisfaction made with one is not a complete answer to an action by both.—*Steeds* v. *Steeds*, 60 L.T. 318; 37 W.R. 378.

Building Agreement :—

(iv.) **C. A.**—*Condition of Re-entry—Separable Provisions—Appropriation of Payments.*—By a building agreement, H. agreed to grant to R. leases of plots of land, when the buildings to be erected thereon should be "roofed in." The leases were to be in a form annexed to the agreement, which form contained a power of re-entry on non-payment of rent, but not on non-performance of any building stipulations. The agreement contained a power of re-entry in case the buildings were not proceeded with for the space of twenty-one clear days. *Held*, that after the buildings were roofed in the power of re-entry in case they were not proceeded with for twenty-one clear days could not be exercised. R. having paid H. various sums, which H. claimed to appropriate otherwise than in respect of rent, *held*, that the onus of showing that such sums were not paid in respect of rent lay on H.—*Lowther* v. *Heaver*, 60 L.T. 310; 37 W.R. 465.

Building Society :—

(v.) **C. A.**—*Advanced Member—Mortgage—Alteration of Rules after Mortgage—Certificate of Registrar.*—R., a member of a building society, borrowed money from the society, and executed a mortgage which contained a covenant to pay all subscriptions and other moneys which, according to the rules of the society for the time being, should become due from him. The rules were afterwards altered so as to make advanced members liable to bear a share of the losses of the society, and the altered rules were certified by the registrar. *Held*, that the certificate was conclusive as to the validity of the altered rule, and that it was binding on R.—*Rosenberg* v. *Northumberland Building Society*, L.R. 22 Q.B.D. 373; 37 W.R. 368.

(i.) **Q. B. D.**—*Investing Member—Withdrawal of—Winding up—Liability—Building Societies Act,* 1874, *s.* 14—*Companies Act,* 1862, *ss.* 38, 200.—The rules of a building society, which was registered under the Building Societies Act, 1874, divided its shares into investing and advanced shares, the investing shares being divided into subscription and paid-up shares, and provided that any investing member, on giving notice as therein mentioned, might withdraw the whole or part of the amount due to him. Certain investing members who held subscription shares which were not fully paid-up, duly withdrew from the society, and a winding-up order was made shortly after. *Held,* that such members having ceased to be members before the winding-up order were not liable to contribute the amount not paid up on their shares.—*Re Sheffield and South Yorkshire Permanent Building Society,* L.R. 22 Q B.D. 470; 60 L.T. 186.

Canada:—

(ii.) **P. C.**—*Rights of Dominion and Provinces—Property in Lands—Indian Reserves—Rights of Crown—British North America Act,* 1867, *s.* 91. *sub-s.* 24, *ss.* 108, 109, 117.—The entire beneficial interest of the Crown in lands within the boundary of each province in the Dominion of Canada was by sec. 109 of the British North America Act, 1867, given to the province: consequently, when by a treaty made in 1873, certain Indian chiefs ceded to the Crown their rights in lands in the province of Ontario, the beneficial interest in such lands passed to the province, and the Dominion Government has no power to dispose of the timber on such lands.—*St. Catherine's Milling Company* v. *The Queen,* 60 L.T. 197.

Champerty:—

(iii.) **Ch. D.**—*Loan to Carry on Suit—Mortgage of Subject of Suit—Bonus—Unconscionable Bargain.*—The plaintiff being in poor circumstances, mortgaged to the defendant his interest in property the subject of proceedings in the Probate Court, to secure repayment of advances made for his maintenance and the costs of the proceedings, together with a bonus. *Held,* that the agreement to pay a bonus was void; (1) as tainted with champerty; (2) as a collateral advantage to a mortgagee; (3) as an undue advantage gained under pressure.—*James* v. *Kerr,* L.R. 40 Ch. D. 449; 60 L.T. 212; 37 W.R. 279.

(iv.) **Ch. D.**—*Maintenance—Assignment of Cause of Action by Trustee in Bankruptcy of Plaintiff—Bankruptcy Act,* 1883, *s.* 50, *sub-s.* 5, *s.* 57, *sub-s.* 8, *s.* 168.—The maintenance of the suit of another is lawful when the person maintaining has an interest in the subject-matter of the action. During the pendency of an action the plaintiff became bankrupt. His trustee in bankruptcy being unwilling to continue the action at his own risk and expense, assigned the right of action to F., a creditor of the plaintiff, who agreed to carry on the action at his own expense, the money recovered to belong, as to one-fourth, to the trustee, and as to three-fourths, to F. *Held,* that the transaction was not champertous, and was permitted by the bankruptcy laws.—*Guy* v. *Churchill* L.R. 40 Ch. D. 481.

Charity:—

(v.) **C. A.**—*Charitable Trusts Act,* 1853, *s.* 28.—*Summons.*—Decision of Ch. D. (*see* Vol. 14, p. 5, iii.), reversed.—*In re Norwich Town Close Estate Charity,* L.R. 40 Ch. D. 298; 60 L.T. 202; 37 W.R. 362.

(vi.) **Ch. D.**—*Scheme—Original Constitution—Alteration of.*—The founder of a charity had instituted officers consisting of a warden and a confrater. In 1873 a scheme was sanctioned whereby a sum was

devoted out of the surplus income to the endowment of schools. Owing to the depreciation of the charity property such sum became diminished, and it was proposed to abolish the office of confrater, which was a sinecure, or to reduce his salary. *Held*, that the schools were objects of the charity, and that to assist them the salary of the confrater might be reduced, though it was not competent for the Court to alter the original constitution by abolishing the office.—*Re Browne's Hospital*, 60 L.T. 288.

See Will, p. 97, iv.

Colonial Law:—

(i.) **P. C.**—*British Honduras—Mortmain Act.*—The Mortmain Act is not in force in British Honduras.—*Jex* v. *McKinney*, 60 L.T. 287.

(ii.) **P. C.**—*Jersey—Improperly Executed Will—Codicil—Lapsed Legacies.*—The rule of Roman law by which a codicil fails if the will is void is not part of the law of Jersey. The French law as to lapsed legacies, which prevails in Jersey, is the same as the English law. A testator in Jersey by his will gave legacies, but did not dispose of the residue. By codicil he made A. his residuary legatee. The will failed for want of attestation, and was set aside. The codicil was duly attested. *Held*, that A. was entitled to the residue, including the legacies given by the void will.—*Falle* v. *Godfray*, 60 L.T. 120.

Company:—

(iii.) **Q. B. D.**—*Government Guarantee of Interest on Capital—Application of—Preference Shares.*—The Imperial Goverment of Brazil empowered Provincial Governments to grant concessions for railways, and sanctioned the grant of a guarantee of interest on the capital expended, the railways to be kept in repair by the concessionaires. A provincial government granted a concession, and guaranteed 7 per cent. interest on the capital expended, the railway to be maintained and worked by the concessionaires. The Imperial Government guaranteed the payment of such interest. The defendant company was formed to acquire, and did acquire, such concessions. Some of the share capital was entitled to a preferential dividend, payable out of the guaranteed moneys and net earnings of the company. The guaranteed interest was duly paid, but part thereof was applied in the maintenance and working of the railway, and was not available for payment of the preferential dividend. *Held*, that the guaranteed interest was not subject to any trust for the benefit of the preference shareholders, but was paid to the company as a contribution to its revenues to be applied to the purposes to which the earnings of the company might be legitimately applied, and to assist it in carrying out its obligations under the concession.—*Clifford* v. *Imperial Brazilian Natal Railway Co.*, 60 L.T. 60.

(iv.) **Ch. D.**—*Interest in a Company to be formed—Member—Notice—Assets—Companies Act*, 1862, s. 23.—X. was a member of a syndicate which sold property to the A. company. Previously to the incorporation of the company it was ascertained that X.'s share of the consideration for the sale would consist of a certain number of shares in the company. Neither the trustees for, nor the members of, the syndicate, were registered as members of the company, but the company had notice of X.'s interest. The A. company was wound up, and the assets were sold by the liquidator to the B. company, in consideration of shares in the B. company to be allotted to every "member" of the A. company. X. was never registered as a member of the B. company, but such company had notice of his interest. The assets of the B. company were

then sold to the C. company. *Held*, that X. was a "member" of the A. company within the agreement, and that he was entitled to be placed in the same position with regard to the assets of the B. Company as if he had had shares in that company allotted to him.—*Zuccani* v. *Nacupai Gold Mining Co.*, 60 L.T. 23.

(i.) **C. A.**—*Payment of Dividends—Depreciation of Assets—Wasting Asset.*—Decision of Ch. D. (*see* Vol. 13, p. 107, iv.) affirmed.—*Lee* v. *Neuchatel Asphalte Co.*, 37 W.R. 321.

(ii.) **Ch. D.**—*Poll—Legality.*—The articles of association of a company provided that if a poll should be demanded at a general meeting it should be held "at a time and place to be fixed by the directors within seven days from the date of the meeting." A poll having been demanded at a general meeting, the chairman, in accordance with a private arrangement of the directors, ordered it to take place then and there. *Held*, that such taking of the poll was a violation of the articles, and illegal.—*Re The British Flax Producers' Co.*, 60 L.T. 215.

(iii.) **Ch. D.**—*Power of General Meeting.*—The directors of a bank gave notice in their annual report that they would propose a grant to the family of their late manager. *Held*, that the resolution sanctioning such a grant was business which might be transacted at the ordinary general meeting without special notice, and that the grant was of a nature conducive to the interests of the company, and was not *ultra vires*.—*Henderson* v. *Bank of Australasia*, L.R. 40 Ch. D. 170; 58 L.J. Ch. 197; 59 L.T. 856; 37 W.R. 332.

(iv.) **Ch. D.**—*Promoter—Misrepresentations in Prospectus—Liability.*—R., the active partner in a firm of traders, assisted in the preparation of a prospectus to be issued by the directors of a company which was being formed to take over the business of the firm. The prospectus stated that R. would join the board of directors after the purchase of the business. The prospectus contained misrepresentations on the faith of which the plaintiff took shares. *Held*, that R. as a promoter, and as responsible for the information contained in the prospectus, was liable in damages.—*Glasier* v. *Rolls*, 37 W.R. 430.

(v.) **Ch. D.**—*Reduction of Capital—Resolution for—Notices—Sufficiency.*—Where a resolution for the reduction of capital is to be proposed, such reduction to affect only the ordinary shares of a company, the preference shares of which have, by the constitution of the company, no preference as to capital, the notices to be sent to shareholders should state explicitly that the effect of the proposed resolution would be to throw the loss entirely on the ordinary shareholders.—*In re Quebrada Railway Land and Copper Co.*, L.R. 40 Ch. D. 363.

(vi.) **Ch. D.**—*Reduction of Capital—Purchase by Company of its own Shares.*—The directors applied profits in the purchase of shares in the company. The Court sanctioned the reduction of the capital by writing off the nominal amount of capital represented by the shares so purchased, the creditors having assented.—*In re York Glass Co.*, 37 W.R. 471.

(vii.) **Ch. D.**—*Shares Issued at a Discount.*—By agreement between a company and C., it was provided that moneys advanced by C. to or on behalf of the company, should, at the option of C., be a debt due from the company, payable on demand, with interest at 15 per cent. on each item from the date of the advance, or a debt to be discharged by the allotment of fully paid-up shares of a nominal amount equal to the moneys advanced, plus 15 per cent. on such sum. C. elected to

take shares which were allotted. As the moneys were not all advanced at once, the bonus of 15 per cent. exceeded the interest of 15 per cent. on each item from the date of the advance. *Held*, that to the extent of the excess of such bonus over such interest, the shares were issued in respect of moneys not due from the company, and therefore at a discount, and that the issue was void.—*In re Midland Electric Light and Power Co.*, 37 W.R. 471.

(i.) **Ch. D.**—*Shares Issued at a Discount—Rectification of Register—Repayment.*—A shareholder to whom shares have been issued at a discount is entitled to have his name struck off the register, and to have the amount he has paid for the shares repaid. The remedy may be barred by an express or implied contract to hold the shares, subject to a liability to pay up the full amount, and cannot be obtained with respect to shares which have been transferred to a purchaser for value without notice, and subsequently retransferred in exchange for fully paid-up shares.—*In re Railways' Time Table Publishing Co.*, 37 W.R. 283.

(ii.) **C. A.**—*Ultra Vires Act of Directors—Ratification.*—The articles of the A. company authorized the sale of part of its undertaking to another company, and prohibited any director from voting in respect of any contract in which he was interested. The directors contracted on behalf of the company to sell part of the undertaking to the X. company, of which all the directors of the A. company except one were directors. A general meeting of the A. company was called by a circular, which stated that the object of the meeting was to consider a resolution adopting the contract, but gave no reason for such adoption being necessary. The resolution was passed as an ordinary resolution. *Held*, that the resolution was not an alteration of the articles, and that a special resolution was not necessary, and that the resolution was not invalidated by the fact that the notice of the meeting did not explain why such resolution was necessary.—*Grant* v. *United Kingdom Switchback Railways Co.*, L.R. 40 Ch. D. 135; 58 L.J. Ch. 211; 37 W.R. 362.

(iii.) **Ch. D.**—*Winding-up—Commencement of—Companies Act*, 1862, *ss.* 84, 130.—A petition for compulsory winding-up was presented, and a provisional liquidator appointed. Resolutions were then passed by the company for voluntary winding-up, and on the hearing of the petition a supervision order was made. *Held*, that the winding-up commenced at the date of the resolutions, not at that of the appointment of the provisional liquidator, and that the Court had no power to alter the date.—*In re West Cumberland Iron & Steel Co.*, L.R. 40 Ch. D. 361; 37 W.R. 317.

(iv.) **Ch. D.**—*Winding-up—Sale to New Company—Sanction of Court—Validity of Sale—Companies Act*, 1862, *ss.* 160, 161—*Joint Stock Companies Arrangement Act*, 1870, *s.* 2.—A company in voluntary liquidation agreed to sell its assets to a new company, in consideration of the issue to the shareholders of the old company of shares in the new company, on which there was a liability. The arrangement was sanctioned by the Court. *Held*, that it was binding on all the members of the liquidating company.—*Nichol* v. *The Eberhardt Co.*, 59 L.T. 860.

(v.) **Ch. D.**—*Winding-up Petition — Withdrawal by Petitioner—Costs.*—Where a winding-up petition is withdrawn by the petitioner there is no general rule that creditors and shareholders who appear, whether to support or oppose the petition, are entitled to separate sets of costs. The order as to costs will depend on the circumstances of each case.—*In re Criterion Gold Mining Co.*, 60 L.T. 218; 37 W.R. 348.

See **Mandamus, p. 77, v. Solicitor, p. 93, ii.**

Condition:—

(i.) **Ch. D.**—*Payment—Time and Place.*—Where there is a condition for payment of a sum at a time and place certain, the condition is not broken unless a demand for payment is made at the specified place.—*Thorn* v. *City Rice Mills Co.*, L.R. 40 Ch. D. 357; 37 W.R. 398.

Contract:—

(ii.) **C. A.**—*Offer—Acceptance by Unauthorised Agent—Withdrawal—Ratification by Principal.*—An offer was made by A. to B., and was accepted by C., purporting to act on behalf of B., but in reality unauthorised. A. then withdrew his offer, and B. subsequently ratified C.'s acceptance. *Held*, that B. was entitled to specific performance against A. The fact that a simple acceptance of an offer contain a statement that the acceptor will instruct his solicitor to prepare the necessary documents does not make the acceptance conditional. Where there is an offer and acceptance by letters, the fact that one party, who afterwards seeks specific performance, endeavours to introduce a new condition which is resisted by the other party, does not shew that there was no complete contract constituted by the letters containing such offer and acceptance. Decision of Ch. D. (*see* Vol. **13**, p. 57, i.) affirmed. *Bolton Partners* v. *Lambert*, 37 W.R. 434.

(iii.) **C. A.**—*Sale of Goods—Factors Act*, 1877, *s.* 4—*Statute of Frauds*, *s.* 17.—A vendee under a *de facto* contract for the sale of goods, who has obtained from the vendor possession of the documents of title to the goods, although there is no memorandum of the contract so as to satisfy the Statute of Frauds, can give a *boná fide* purchaser without notice a good title to such goods as against the original vendor.—*Hugill* v. *Masker* L.R. 22 Q.B.D. 364; 58 L.J. Q.B. 171; 37 W.R. 390.

(iv.) **C. A.**—*Sale of Goods—Written Memorandum—Statute of Frauds*, *s.* 17.—A note or memorandum of a contract for the sale of goods must, in order to support an action on the contract, have been in existence when the action was commenced.—*Lucas* v. *Dixon*, L.R. 22 Q.B.D. 357 58 L.J. Q.B. 161; 37 W.R. 370.

See Local Government, p. 77, i.

Copyholds:—

(v.) **Q. B. D.**—*Enfranchisement—Valuation—Review—"Imperfect or Erroneous"—Copyhold Act*, 1887, *s.* 11.—The power of the Land Commissioners to review a valuation which is "imperfect or erroneous" is limited to cases where matters have been omitted, or jurisdiction exceeded, by the umpire, and does not extend to cases where the valuation appears too high or too low.—*Reg.* v. *Land Commissioners o England*, 37 W.R. 350.

Copyright:—

(vi.) **C. A.**—*Joint Owners—Separate Registrations—Newspaper—Copyright Act*, 1842, *ss.* 18, 19, 24.—A., B., and C., each being the owner of a newspaper which was duly registered under the Copyright Act, 1842, employed persons to compile lists of bankruptcies, on the terms that the copyright in the lists should belong to A., B., and C. The lists were published in the newspapers of A., B., and C. *Held*, that the registration was sufficient, and that A., B., and C. could maintain an action against D. to restrain him from infringing their copyright in the lists.—*Trade Auxiliary Co.* v. *Middlesborough, &c., Trade Protection Association*, L.R. 40 Ch. D. 425; 37 W.R. 337.

(i.) **Ch. D.**—*Joint Owners—Separate Registrations—Copy from a Republication—Newspaper Copyright Act*, 1842, *ss.* 18, 19.—*Held*, that the plaintiffs in the last case could maintain an action against X. to restrain infringement of their copyright in the same lists, X. having copied the same, not from any of the plaintiffs' newspapers, but from a reproduction of the same matter issued in a different form by one of the plaintiffs.—*Cate* v. *Devon & Exeter Constitutional Newspaper Co.*, L.R. 30 Ch. D. 500.

Corrupt Practices:—

(ii.) **C. A.**—*Exemption from Penalties—Appeal.*—The decision of a Divisional Court refusing an exemption in respect of practices rendered illegal by the Municipal Elections (Corrupt Practices) Act, 1884, may be appealed against. Such Act is incorporated into the Local Government Act, 1888. Consideration will be shewn to candidates inadvertently guilty of illegal practices at an election, where the Acts referring to such election are complicated.—*In re Walker*, L.R. 22 Q.B.D. 384; 58 L.J. Q.B. 190; 37 W.R. 293.

Costs:—

(iii.) **C. A.**—*Administration—Trustees—Delay—Negligence—R.S.C.*, 1883, *O.* lxv., *r.* 11.—Decision of Ch. D. (*see* Vol. **14**, p. 31, iv.) affirmed.—*Brown* v. *Burdett*, L.R. 40 Ch. D. 244.

See Bankruptcy, p. 63, v. Solicitor, p. 94, iii. Practice, p. 82, i.—v.

Criminal Law:—

(iv.) **C. C. R.**—*Venue—Undischarged Bankrupt—Obtaining Credit.*—An undischarged bankrupt residing in the county of L., went to the county of S., and there obtained goods on credit. Part of them he disposed of in S., and the rest he sent to L. He was indicted in the county of L. for having obtained credit, while he was an undischarged bankrupt, without informing the persons from whom credit was obtained of the fact that he was an undischarged bankrupt. *Held*, that the credit was obtained in the county of S., and that the indictment was wrongly laid in L.—*Reg.* v. *Dawson*, 59 L.T. 932.

County Court:—

(v.) **C. A.**—*Certiorari—Title to Hereditaments—County Courts Act*, 1888, *s.* 56.—An action in which the title to leasehold property is in question is properly removed from the County Court into the High Court.—*Tomkins* v. *Jones*, 37 W.R. 328.

Easement:—

(vi.) **C. A.**—*Light and Air—Interruption of Fluctuating Nature—Onus of Proof.*—*Semble*, that if on the plaintiff's evidence there appears to have been an interruption of a permanent nature, the onus of showing that it did not continue, and was not acquiesced in, for a year, is on the plaintiff; but if such interruption appears to be of a fluctuating nature, the onus of shewing that it did continue, and was acquiesced in, for a year, is on the defendant. Where the defendant proved that he had, continuously and without interruption, been in the habit for many years of piling up packing cases which interrupted the plaintiff's light, which packing cases were from time to time, as they accumulated in convenient quantities, either returned to the senders, or broken up, *held*, that there was no such interruption as to disentitle the plaintiff to relief.—*Presland* v. *Bingham*, 37 W.R. 385.

Ecclesiastical Law:—

(i.) **Q. B. D.**—*District—New Parish—Rights of Burial*—6 & 7 *Vict.*, c. 37, ss. 11, 12, 13, 14, 15—19 & 20 *Vict.*, c. 104, ss. 11, 14, 15.—Where a district, which has a burial ground, becomes a separate and distinct parish for ecclesiastical purposes, the inhabitants of such new parish cease to have any rights of burial in the burial ground of the old parish.—*Hughes* v. *Lloyd*, L.R. 22 Q.B.D. 157; 58 L.J. Q.B. 122; 37 W.R. 380.

Elementary Education:—

(ii.) **Q. B. D.**—*Attendance of Child—Order on Parent—Reasonable Excuse for Non-Compliance—Elementary Education Act*, 1876, ss. 11, 12.—The parent of a child on whom an attendance order had been made, gave as an excuse for non-compliance, that the child had played truant against his wish, and that he had used every endeavour (short of taking the child to school) to ensure its attendance. *Held*, that this was not a "reasonable excuse," and that the magistrate had power to order the child to be sent to an industrial school. — *Hewett* v. *Thompson*, 58 L.J. M.C. 60; 60 L.T. 268.

Estoppel.—*See* Sale of Goods, p. 90, vi.

Evidence:—

(iii.) **C. A.**—*Horse Frightened by Heap of Earth—Evidence that other Horses had been Frightened.*—Action for a nuisance in placing on the roadside a heap of earth, by which the plaintiff's horse was frightened. *Held*, that evidence that other horses had been frightened by the same heap of earth was admissible.—*Brown* v. *Eastern & Midlands Railway*, L.R. 22 Q.B.D. 391; 60 L.T. 266.

See Will, p. 97, v.

Extradition.—*See* Justices, p. 75, iv.

Factor.—*See* Contract, p. 71, iii.

Gaming:—

(iv.) **Q. B. D.**—*Licensed Premises—Game of Skill—Licensing Act*, 1872, s. 17. —A licensed person allowed a game of skill to be played for money on his licensed premises. *Held*, that he could be properly convicted of suffering gaming.—*Dyson* v. *Mason*, L.R. 22 Q.B.D. 351; 58 L.J. M.C. 51; 60 L.T. 265.

(v.) **Q. B. D.**—*Licensed Premises—Penalty—Betting Houses Act*, 1853, s. 3 —*Licensing Act*, 1872, s. 17.—A licensed person using his premises for the purposes of betting is still liable to the penalty of £100 under the Betting Houses Act, 1853, although the Licensing Act, 1872, provides a penalty of £10 for the same offence.—*Sims* v. *Pay*, 58 L.J. M.C. 39.

See Principal and Agent, p. 88, ii.

Highway:—

(vi.) **Q. B. D.**—*Statutory Duty to Build Substantial Bridges—Increase of Traffic.*—A dock company, being required by statute to build and keep in repair, good and substantial bridges for carriages, horses, and passengers over their cuts, built bridges sufficient to carry the then traffic of the district. Subsequently, in consequence of the building of manufactories, the traffic was increased by loads which the bridges were insufficient to carry. *Held*, that the company was not bound to provide bridges sufficient for such extraordinary traffic.—*Reg.* v. *East and West India Dock Co.*, 60 L.T. 232.

Husband and Wife:—

(i.) **P. D.**—*Divorce—Separation Deed—Damages.*—Where a husband and wife are living apart under a separation deed, which was entered into on account of the wife's intimacy with the co-respondent, and the wife subsequently commits adultery with him, the husband, obtaining a decree for divorce, is entitled to the same damages as if there had been no separation deed.—*Izard* v. *Izard*, L.R. 14 P.D. 45.

(ii.) **Ch. D.**—*Separate Estate—Gift to Husband—Income.*—On the marriage of A. with her late husband, a sum of money was transferred to their joint names in trust for her separate use. The husband, with A.'s consent, received the income, and subsequently realised the capital, and applied it to his own use, but always spoke of it as his wife's money. She alleged that before the marriage she had intended to give him the money, but that he had refused. *Held*, that as the husband was an express trustee of the fund, and there was no evidence that he had accepted it as a gift, A. could claim it as a creditor of his estate, but that she could not recover the income which had been received by the husband.—*Blake* v. *Power*, 37 W.R. 441.

(iii.) **Ch. D.**—*Separate Estate of Wife—Gift to Husband.*—A married woman, X., was entitled under the will of a testatrix to a sum of money for her separate use. A mortgage for a larger sum held in trust for the testatrix was in 1867 transferred by X., and the executor of the will of the testatrix to Y., the husband of X., he paying out of his own moneys to the executor the difference between the two sums. In 1869 Y. sold the mortgaged property as mortgagee, and X. and the executor concurred in the assignment to the purchaser, the execution by X. being procured by Y. The purchase money was received by Y., who applied it to his own use. After the death of Y. in 1885, X. claimed to prove as a creditor against his estate for the sum received by him in 1867. She denied having given him authority to receive the money, and there was some evidence that she objected to his receiving it. She had no independent advice in respect to the transaction. *Held*, that the representatives of Y. had not discharged the burden which lay on them of proving a gift of the capital sum by X. *Held*, also, that the claim of X. for interest on such sum during the life of Y. must be disallowed.—*Wood* v. *Cock*, L.R. 40 Ch. D. 461.

(iv.) **Ch. D.**—*Separate Estate—Gift to Husband—Income—Breach of Trust—Acquiescence.*—By a marriage settlement the wife was entitled to the income of the trust property. She had power to appoint £10,000. She contemplated a gift of capital to her husband, and appointed that stock worth £10,000 should be transferred to herself and her husband jointly. The stock was sold and the proceeds received by the husband. The wife joined in the transfers, and there was no evidence of pressure. *Held*, that there was a gift of the £10,000 to the husband. The trustees lent the husband part of the trust funds. *Held*, that the wife's executors were not prevented, by the alleged acquiescence of the wife in such breach of trust from obtaining restitution of the funds so lent. The husband rebuilt a house on the settled property with the consent of the trustees. *Held*, that this could not be treated as an exercise by the trustees of a power to invest in land, so as to enable the husband to set-off the amount spent in such rebuilding against the sums due from him. The husband was allowed by his wife to receive the income of the settled property: *held*, that he could not be compelled to account for it.—*Hale* v. *Sheldrake*, 60 L.T. 292.

(i.) **Q. B. D.**—*Wedding Presents—Bankruptcy—Separate Estate.*—Presents given to a woman in contemplation of her marriage belong to her for her separate use, and do not pass to the trustee in bankruptcy of her husband, unless it is clear that they are meant to be given to the husband so as to be liable for his debts. Furniture was bought by a husband and wife, and paid for by the wife out of her separate income. *Held*, that it did not pass to her husband's trustee in bankruptcy.—*E. p. Pannell; in re Jamieson*, 60 L.T. 159; 37 W.R. 467.

Infant:—

(ii.) **Q. B. D.**—*Right of Guardian to Custody—Habeas Corpus.*—A widow without means voluntarily placed her son (who had been baptised as a Roman Catholic) in a Protestant charitable school. When the son was about nine years old she desired to remove him to be educated as a Roman Catholic. The authorities of the school resisted her demand, on the ground that it was not for the child's benefit. *Held*, on the widow's application for a writ of *habeas corpus*, that the authorities of the school had no right to detain the child from the custody of its lawful guardian.—*Reg.* v. *Williams*, 58 L.J. Q.B. 176.

See Practice.

Insurance:—

(iii.) **Q. B. D.**—*Cause of Death—Accident—Death through Debility caused by Accident—Power of Arbitrator.*—A policy of assurance against accidents provided that the sum assured should be paid if the assured "should sustain any injury caused by accident or violence within the meaning of the policy, and if the assured should die from the effects of such injury within three calendar months." The assured met with an accident within the meaning of the policy, and died from the effects of a cold, the catching of which and its fatal effects were due to debility caused by the accident. *Held*, that the assurers were liable. *Held*, that the arbitrator in a reference under the Railway Passengers' Assurance Company's Act, 1864, has power to state a case, the relation between the company and the assured being founded on contract.—*In re an Arbitration between Isitt and the Railway Passengers' Assurance Co.*, L.R. 22 Q.B.D. 504; 58 L.J. Q.B. 191; 60 L.T. 297; 37 W.R. 477.

Justices:—

(iv.) **Q. B. D.**—*Jurisdiction—Evidence—Question of Fact—Appeal—Extradition—"Native-born British Subject"—Extradition Act*, 1870.—Where a magistrate commits a prisoner on depositions taken before another magistrate, such committal is irregular. A magistrate decided that a prisoner was not a "native-born" British subject within the exemption contained in the French extradition treaty, on evidence which merely proved that he was not born in Great Britain. *Held*, that the decision was reviewable; that "native-born" and "natural-born" had the same meanings, and that an issue must be stated to determine whether the prisoner had or had not the status of a British subject.—*In re Guerin*, 58 L.J. M.C. 42; 37 W.R. 269.

(v.) **Q. B. D.**—*Order—Form of—County Treasurer—Parish Authorities.*—The authorities of a parish obtained a justice's order on the county treasurer to reimburse them the expenses incurred in respect of duties cast on them by the provisions of a statute. The order did not shew on the face of it matters from which jurisdiction could be inferred, and did not specify the nature of the expenses sufficiently to indicate that they were incurred under the provisions of the statute, but only referred to the year of the reign in which the statute was passed. *Held*, that the order was bad.—*Reg.* v. *Kent*, 58 L.J. Q.B. 71.

Lands Clauses Act:—

(i.) **Ch. D.**—*Re-investment—Different Funds—Apportionment of Costs.*—An ecclesiastical corporation presented a petition for the approval of two contracts for the purchase of land as a re-investment of two sums in Court, one of which represented the purchase money of lands taken by a railway company. *Held*, that the company's fund ought to be applied only to one contract, and that the company ought to pay a rateable proportion of the stamp on the conveyance, one-half of the costs of the petition, and one-fourth of the other costs of re-investment. —*E. p. The Perpetual Curate of Bilston*, 37 W.R. 460.

Licensing:—

(ii.) **Q. B. D.**—*Club—Sale of Liquor by Manager to Members—Licensing Act*, 1872, *s.* 3, *sub-s.* 1.—The manager of a club in the form of a limited company, the shareholders being the members of the club, is not liable criminally for the sale of intoxicating liquors at the club to members.—*Newell* v. *Hemingway*, 58 L.J. M.C. 46.

(iii.) **Q. B. D.**—"*Second Offence.*"—A person cannot be convicted for a "second offence" under section 3 of the Licensing Act, 1872, unless the first conviction has been under the same statute.—*In re Authers*, L.R. 22 Q.B.D. 345; 58 L.J. M.C. 62; 37 W.R. 320.

(iv.) **Q. B. D.**—*Spirit Licences—Refusal—Wine and Beerhouse Act*, 1869, *s.* 8—*Licensing Act*, 1872, *s.* 69—*Beer Dealers' Retail Licences Act*, 1880, *s.* 1—*Beer Dealers' Retail Licences (Amendment) Act*, 1882.—Justices can only refuse a spirit licence on one of the grounds stated in the Wine and Beerhouse Act, 1869, s. 8.—*Reg.* v. *Scott*, L.R. 22 Q.B.D. 481; 58 L.J. M.C. 78; 60 L.T. 231; 37 W.R. 301.

Local Government:—

(v.) **Q. B. D.**—*Borough Rate—Validity—Municipal Corporations Act*, 1882, *s.* 144.—The fact that a town council in levying a rate fixes the amount in the pound, instead of assessing the contribution of each parish and leaving the overseers to fix the amount in the pound, does not render the rate invalid.—*Durham (Mayor)* v. *Fowler*, L.R. 22 Q.B.D. 394.

(vi.) **Ch. D.**—*Expenses of Paving New Street—Charge on Property—Public Health Act*, 1875, *ss.* 150, 257, 313; 30 *Vict.*, *c.* lvi., *ss.* 1, 30, 31.—By a local Act an Urban Authority was empowered to recover from the owners or occupiers of premises adjoining a new street, the estimated expense of paving the street before the work was completed; and it was provided that in case the actual expense of paving should be less than the estimate, the difference should be paid to the owners of property who might have paid such estimated expenses, or whose property might have been "charged therewith." The local Act was to be construed as one Act together with the Public Health Act, 1875. *Held*, that the Urban Authority could not claim a charge on premises under the Public Health Act, 1875, for the estimated expenses of paving a new street before the work was done.—*Corporation of West Ham* v. *Grant*, L.R. 40 Ch. D. 331; 58 L.J. Ch. 121; 60 L.T. 17.

(vii.) **Q. B. D.**—*Nuisance—Sewage Works—Order of Justices to Abate—Public Health Act*, 1875, *ss* 27, 32-34, 91-96.—Where an Urban Sanitary Authority have, after compliance with the provisions of the Public Health Act, 1875, constructed sewage works outside their own district, and in that of a Rural Sanitary Authority, it is not competent for two Justices to make an order on the Urban Sanitary Authority to abate a nuisance arising from the works.—*Reg.* v. *Parlby*, L.R. 22 Q.B.D. 520; 58 L.J. M.C. 49; 37 W.R. 335.

(i.) **Ch. D.**—*Road—Agreement to Adopt and Dedicate—Power of Local Authority—Contract—Public Health Act*, 1875, *ss.* 146, 147, 148, 174.—A petition was presented by two local authorities to the Local Government Board, which was sealed by both the authorities, and which stated an agreement, not under seal, whereby one of the authorities agreed to adopt and complete a road and to dedicate it as a public highway. The cost of completing such road would be over £50. *Held*, that a contract under seal was necessary to make such an agreement binding, and that the petition was not such a contract. *Held*, also, that a local authority cannot contract to dedicate a road as a highway.—*Tunbridge Wells Improvement Commissioners* v. *Southborough Local Board*, 60 L.T. 172.

Lunatic:—

(ii.) **Ch.**—*Committee—Surety—Sale of Share of Lunatic in Land.*—Where the proposed committee of a lunatic was unable to find sureties, *ordered*, with the consent of the next-of-kin of the lunatic, that the suretyship of a Guarantee Society should be accepted, and that the premiums should be paid out of the lunatic's estate. Liberty granted to the committee to take proceedings under the Settled Land Act, 1882, for the sale of the lunatic's undivided shares in land to a co-owner.—*In re Gaitskell*, L.R. 40 Ch. D. 416; 58 L.J. Ch. 262.

(iii.) **C. A.**—*Expenses incurred at a Commission—Action against Lunatic—Lunacy Regulation Act*, 1862, *s.* 71.—After a petition was presented for an enquiry as to the sanity of the defendant, the solicitor acting for the defendant engaged a medical man to examine him and give evidence. The defendant was proved to be of unsound mind. *Held*, that the medical man could sue for his fees.—*Brockwell* v. *Bullock*, 37 W.R. 455.

Mandamus:—

(iv.) **Q. B. D.**—*Grant of—Alternative Remedy—Transfer of Shares in Company—Registration—Common Law Procedure Act*, 1854, *s.* 58—*Companies Act*, 1862, *s.* 35.—The granting of a prerogative writ of mandamus is discretionary, and such writ will not be granted where there is another remedy equally convenient, beneficial, and effectual open to the applicant at the time when it is necessary for him to enforce or establish his rights. Therefore such a writ will not be granted to enforce the registration of a transfer of shares in a company.—*Reg.* v. *Lambourne Valley Railway Co.*, L.R. 22 Q.B.D. 463; 58 L.J. Q.B 136; 66 L.T. 54.

Married Woman:—

(v.) **C. A.**—*Debt of Wife before Marriage—Separate Property of Wife—Restraint on Anticipation—Married Women's Property Act*, 1870, *s.* 12.—Judgment was recovered against a husband and wife in respect of a debt contracted by the wife before the marriage, which took place in 1879. The wife had separate property, settled on her for life without power of anticipation. *Held*, that it was liable to satisfy the judgment.—*Axford* v. *Reid*, 37 W.R. 291.

(vi.) **C. A.**—*Restraint on Anticipation—Release from—Conveyancing Act*, 1881, *s.* 39.—The power of relieving from a restraint on anticipation will be exercised with great caution. A. had a life interest with a restraint on anticipation in a fund, and a power of appointment among her children. Being past child-bearing and having five children, of whom one, X., was over twenty-one, she released her power of appointment, thereby giving X. an indefeasible interest in one-fifth of the fund. With X.'s assent she applied to be relieved from the restraint to enable her to raise money on the one-fifth for the benefit of herself and her

family. The release of the power was made with a view to the application. *Held*, that the application ought not to be acceded to.—*Harrison* v. *Harrison*, L.R. 40 Ch. D. 418; 58 L.J. Ch. 233; 60 L.T. 246; 37 W.R. 289.

(i.) **P. D.**—*Will—Probate—Presumption as to Separate Property—Married Women's Property Act*, 1882.—*Semble*, it will now be presumed that a married woman, making a will, has separate property. A woman, married in 1878, made her will, to which the husband did not assent. On the will being propounded for probate, the husband opposed on the ground that the testatrix had no separate property. The Court, finding on evidence that the testatrix had separate property, pronounced for the will with costs, but declined to decide of what the separate property consisted, or what was the proper destination of such property.—*Harding* v. *Sutton*, 59 L.T. 838.

Master and Servant :—

(ii.) **Q. B. D.**—*Employers' Liability Act*, 1880, *s.* 1, *sub-s.* 3—*Conformity to Orders.*—Where two men are working the same machine, the fact that one of the two must direct the other when the machine is to be started does not make him a person "to whose orders or directions" the other is "bound to conform," so as to make the employer liable for his negligence.—*Howard* v. *Bennett*, 58 L.J. Q.B. 129; 60 L.T. 152.

(iii.) **Q. B. D.**—*Employers' Liability Act*, 1880, *s.* 1, *sub-s.* 1; *s.* 2, *sub-s.* 3—*Defective Structure—Volenti non fit Injuria.*—A workman was employed to work on a staging in the middle of a river. It was protected on one side only, and his duty was to work on the unprotected side. In the course of his employment he fell into the river on the unprotected side, and was drowned. In an action by his widow against the employer the jury found that the structure was defective, and that the deceased lost his life in consequence of the defect, but that he knew of the defect, and was willing to incur the risk. *Held*, that the employer was not liable.—*Church* v. *Appleby*, 58 L.J. Q.B. 144.

(iv.) **Q. B. D.**—*Employers' Liability Act*, 1880, *s.* 1, *sub-s.* 1—*Defect in Plant.*—The plaintiff was engaged in moving iron stanchions on a trolley. In consequence of their not being packed to prevent falling off, one of them fell and injured the plaintiff. *Held*, that such neglect to pack the stanchions was not a defect in plant so as to make the employer liable.—*Corcoran* v. *East Surrey Ironworks Co.*, 58 L.J. Q.B. 145.

(v.) **Q. B. D.**—*Negligence—Foreman—Employers' Liability Act*, *s.* 1, *sub-s.* 1; *s.* 2, *sub-s.* 1.—The plaintiff was employed by the defendants at their works, which had been injured by a fire. The defendants' foreman, seeing that a wall was unsafe, ordered the workmen out of danger, and ordered a contractor who was repairing the buildings to shore up the wall. On being assured by the contractor that the wall was safe, he, without personally inspecting the wall, sent the men back to their work. The wall fell, and the plaintiff was injured. *Held*, that there was no evidence of negligence on the part of the defendants or their foreman.—*Moore* v. *Gimson*, 58 L.J. Q.B. 168.

Metropolis Management :—

(vi.) **Q. B. D.**—*Building Line—Removal of House—Metropolis Management Act*, 1862, *s.* 75.—A house was at the corner of S. street and C. road. It was in the same line as the other buildings in S. street, and had no access except from S. street. The architect gave his certificate that the building line in C. road exceeded 50 feet from the highway. The

house was within 50 feet of C. road, and the magistrate found as a fact that it was in C. road. *Held*, that he had jurisdiction to order the removal of so much of it as was within the 50 feet.—*Gilbart* v. *Metropolitan Board of Works*, 60 L.T. 149.

(i.) **C. A.**—*Notice of Action—Vestry—Negligence*—18 & 19 *Vict.*, *c.* 120, *s.* 116—25 & 26 *Vict.*, *c.* 102, *s.* 106.—The plaintiff was a driver employed by contractors who had agreed with the defendants to supply horses and drivers for their watering carts. The defendants negligently supplied a defective watering cart, and the plaintiff was injured. *Held*, that the defendants were entitled to notice of action.—*Edwards* v. *Vestry of St. Mary, Islington*, L.R. 22 Q.B.D. 338; 58 L.J. Q.B. 165; 37 W.R. 347.

Mines:—

(ii.) **C. A.**—*Reservation—Clay.*—Where land, the surface of which consisted of alluvial clay, valuable for making bricks and tiles, was conveyed with a reservation of mines and minerals, *held*, that the clay was within the reservation.—*Earl of Jersey* v. *Neath Poor Law Guardians*, 37 W.R. 368.

(iii.) **Q. B. D.**—*Right of Support—Inclosure Act—Lord of Manor—Waterworks—Waterworks Clauses Act*, 1847, *ss.* 18, 22, 23.—Common lands of a manor, the fee simple of which, with the minerals thereunder, and power to work the same, had been vested in the lord, were inclosed and allotted by an Inclosure Act. The Act provided that the lord should enjoy all mines as fully as if the Act had not passed, without paying compensation. The annual rent of a small part of the lands was reserved to provide compensation for the allottees, the deficiency to be made up by a rate on the allottees. *Held*, that the lord was not entitled to work the minerals so as to let down the surface. The plaintiffs purchased compulsorily from one of the allottees part of his allotment, and constructed a reservoir thereon. *Held*, by Cave, J., that the lord had only the same right to work the minerals as he had before such purchase, and was not entitled to let down the surface. *Held*, by Smith, J., that as the plaintiffs had purchased only the surface, and had given no notice to treat with respect to the minerals, the lord was entitled to work them in the ordinary course of mining even though he let down the surface.—*Consett Waterworks Co.* v. *Ritson*, L.R. 22 Q.B.D. 318.

Mortgage:—

(iv.) **Ch. D.**—*Constructive Notice—Solicitor—Priority.*—A solicitor drew a memorandum of charge by A. in favour of the plaintiff. He afterwards himself advanced money to A. on the security of a legal mortgage of the property included in the charge. The solicitor gave evidence that the memorandum was not signed at the time it was prepared, and that he was not aware that it had been signed at the time of his own advance. *Held*, that the solicitor's mortgage must be postponed to the plaintiff's charge.—*Higgins* v. *Burchell*, 60 L.T. 32.

(v.) **Ch. D.**—*Commission on Advance.*—In the absence of oppression or unfair dealing, there is nothing to prevent a mortgagee from bargaining for a commission on the amount of his loan, and his deducting or retaining the amount of such commission from the sum advanced is equivalent to a payment of such amount to him by the mortgagor.—*Mainland* v. *Upjohn*, 37 W.R. 411.

(vi.) **Ch. D.**—*Equitable—Death of Mortgagor Intestate—Vesting Order—Trustee Act*, 1850, *s.* 7.—A mortgagor deposited the title deeds of land with a memorandum whereby he agreed to execute a legal mortgage

when required. He died intestate, leaving an infant heir-at-law. *Held*, that a vesting order could be made vesting the legal estate of the land in the mortgagee, subject to the heir-at-law's right to redeem.—*In re Jones's Mortgage*, 59 L.T. 859.

(i.) **Ch. D.**—*Equitable—Postponement—Negligence.*—An equitable mortgagee may be postponed to another equitable mortgagee, whose security is later in date, when he has been guilty of negligence in omitting to obtain possession of, or make enquiries for, title deeds, whereby the mortgagor has been enabled to obtain the second loan.—*Farrand* v. *Yorkshire Banking Co.*, L.R. 40 Ch. D. 182; 58 L.J. Ch. 238; 37 W.R. 318.

(ii.) **Ch. D.** — *Equitable Mortgage — Power of Sale — Conveyance by Mortgagee alone—Lord Cranworth's Act, s.* 15.—A mortgagor by deed in 1870 charged property with the repayment of an advance, and covenanted to execute a legal mortgage with power of sale. The legal mortgage was never executed. The mortgagee sold under the power of sale in Lord Cranworth's Act. *Held*, that the conveyance of the mortgagee to the purchaser was sufficient without the concurrence of the mortgagor.—*In re Solomon and Meager's Contract*, L.R. 40 Ch. D. 508; 37 W.R. 331.

(iii.) **Ch. D.**—*Foreclosure—Possession—Chattels—Injunction.*—After an order for foreclosure absolute made on originating summons, the Court will grant an order for possession, though not asked for by the summons; and will also, on motion, grant an injunction to restrain the removal of chattels comprised in the security, and an order for restitution of chattels wrongfully removed.—*Manchester and Liverpool Bank* v. *Parkinson*, 60 L.T. 258.

(iv.) **Ch. D.**—*Bankrupt Mortgagor—Foreclosure—Assessed Value of Security—Official Receiver.*—Where, on the bankruptcy of a mortgagor, his equity of redemption having become vested in the official receiver, the mortgagee valued his security at less than the amount of the mortgage debt, and then commenced a foreclosure action against the official receiver and subsequent incumbrancers, *held*, that the judgment ought to shew that the official receiver was entitled to redeem on payment of a less sum than the subsequent incumbrancers.—*Knowles* v. *Dibbs*, 37 W.R. 378; 60 L.T. 291.

(v.) **Ch. D.**—*Payment by Party not Interested—Right to have Mortgage Kept Alive—Subrogation—Right to follow Trust Funds.*—A., the trustee of an equity of redemption, being called on by the mortgagee to pay off part of the mortgage debt, with the consent of B., the beneficiary, borrowed from X. for that purpose a sum which, to the knowledge of A. and B., he held as a trustee. The mortgage was paid off to the extent of such sum, and interest on such sum was continuously paid to X. B., having obtained an assignment of the equity of redemption, *held*, that as A., if he had paid off the mortgage himself, would have been entitled to have it kept alive for his benefit, X., who had paid it at A.'s request, was entitled to stand in his shoes. *Held*, also, that X. was entitled to follow his advance as trust moneys.—*Patten* v. *Bond*, 37 W.R. 373.

(vi.) **P. C.**—*Redemption—Estate taken by Mortgagor.*—M., one of several tenants in common in tail, with cross remainders in tail, under a will, barred her estate tail in order to join with the tenant for life in a mortgage. The proviso for redemption was, "the mortgagee will reconvey the said hereditaments unto the said mortgagors respectively, or as they shall respectively appoint, according to their respective

original estates and interests therein." *Held*, that the proviso for redemption referred back to the will as the origin of title, and brought in the whole series of limitations contained in it, so that on redemption M. took the same estate as she had taken under the will.—*Plumley* v. *Felton*, 60 L.T. 193.

See Administration, p. 61, iii. Vendor and Purchaser, p. 96, i.

Negligence:—

(i.) **C. A.**—*Duty towards Licensee—Want of Ordinary Care.*—Decision of Q. B. D. (*see* Vol. **13**, p. 123, iii.) affirmed.—*Tolhausen* v. *Davies*, 58 L.J. Q.B. 98.

Notice.—*See* Mortgage, p. 79, iv.

Partnership:—

(ii.) **P. C.**—*Personal Liability of Partners.*—A. and B. agreed with X. to enter into a land speculation. It was agreed that "any land acquired, or which may hereafter be acquired, shall be bought or acquired for the benefit of the whole of the parties to this agreement, who shall be liable for the cost thereof *pro ratâ* according to the value of each share held in the said property." X. managed the speculation, and borrowed money for the purposes thereof, granting a mortgage on the lands of the adventurers, which contained a clause making him personally liable for the debt. The agreement was shewn to the lender, who made the advance in consideration of its existence. *Held*, that in the absence of evidence that A. and B. had authorised X. to pledge their personal credit, they were not liable for the debt. *Blaine* v. *Holland*, 60 L.T. 285.

Patent:—

(iii.) **Ch. D.**—*Costs—Action for Infringement—Payment into Court—Patent Law Amendment Act*, 1852, *s.* 43—*Patents, &c., Act*, 1883, *s.* 31.—The defendant in an action for infringement of a patent did not deny the validity of the patent, but denied the infringement, and in the alternative paid a sum into Court. At the trial he did not oppose the claim for an injunction, and an inquiry as to damages was ordered. *Held*, that there was no ground for depriving the plaintiffs of their solicitor and client costs.—*United Telephone Co.* v. *Patterson*, 60 L.T. 315.

Photograph:—

(iv.) **Ch. D.**—*Portrait—Implied Contract.*—There is an implied contract between a photographer and a person who is photographed by him on the usual terms, that prints taken from the negative are to be appropriated to the use of such person only, and the photographer may be restrained by injunction from dealing with the prints in violation of such contract.—*Pollard* v. *The Photographic Co.*, L.R. 40 Ch. D. 345; 58 L.J. Ch. 251; 37 W.R. 266.

Poor Law:—

(v.) **C. A.**—*Rate on Tithes—Recovery*—6 *&* 7 *Wm. IV.*, *c.* 71, *ss.* 69, 70—1 *Vict.*, *c.* 69, *s.* 8.—A poor rate assessed on the owner of tithe rent-charge is not recoverable by distress warrant against such owner.—*Lamplugh* v. *Norton*, L.R. 22 Q.B.D. 452; 37 W.R. 422.

(vi.) **Q. B. D.**—*Rating—Small Tenement—Rating of Owner—Deductions*—6 *&* 7 *Wm. IV.*, *c.* 96, *s.* 1.—S. was assessed to the poor rate as the owner of a small tenement let by the week to artizans, the owner paying all outgoings. It was practically impossible to let the tenement on any other terms. *Held*, that in estimating the gross rental the owner was not entitled to any deduction in respect of "voids," loss of rent in con-

sequence of the inability of tenants to pay, or costs of collection.—*Smith* v. *Churchwardens of Birmingham*, L.R. 22 Q.B.D. 211; 58 L.J. M.C. 23; 60 L.T. 181.

Practice :—

(i.) **P. D.**—*Administration—Revocation of—Motion.*—An application to revoke a grant of administration will not be heard on motion without the consent of all parties. If they do not consent, an action must be commenced.—*In the Goods of Baddeley*, 60 L.T. 237.

(ii.) **Q. B. D.**—*Adding Defendant—R.S.C.* 1883, *O.* xvi., *r.* 11.—The plaintiffs granted to B. a lease of premises, B. covenanting to repair. D. became equitable assignee of the lease. On B.'s death her executors assigned to the defendant, for a nominal consideration, whatever interest they had as such executors in the lease. The plaintiffs sued the defendant, as assignee of the lease, for damages for breach of the covenant to repair. D. was made a third party. All questions in the action were referred for trial to the official referee, who ordered that B.'s executors should be added as defendants. *Held*, that he had no power to make the order.—*Byrne* v. *Brown*, 60 L.T. 108.

(iii.) **Ch. D.**—*Affidavit—Deponent's Place of Abode.*—An affidavit by a stockbroker does not state the description and true place of abode of the deponent by describing him as "A. B., Stock Exchange, Stockbroker."—*Levin* v. *Levin*, 37 W.R. 396; 60 L.T. 315.

(iv.) **C. A.**—*Appeal—Time for—Registrar of Probate Division—R.S.C.*, 1883, *O.* liv., *rr.* 12, 21; *O.* lxxi., *r.* 1.—The time for appealing from the order of a registrar of the Probate Division is the same as that for appealing from the order of a master.—*In the Goods of Patrick*, L.R. 14 P.D. 42; 37 W.R. 393.

(v.) **C. A.**—*Appeal—County Court—Leave for.*—Where, on a County Court appeal, the Divisional Court has refused leave to appeal to the Court of Appeal, there is no appeal from such refusal.—*Kay* v. *Briggs*, L.R. 22 Q.B.D. 343; 58 L.J. Q.B. 182; 37 W.R. 291.

(vi.) **Ch. D.**—*Attachment—Chambers.*—An application for leave to issue a writ of attachment may be properly made in chambers, and may be dealt with by the chief clerk, subject to the rule that an order leading to imprisonment must be made by the Judge personally (*see* Vol. **14**, p. 45, iii.)—*Davis* v. *Galmoyle*, L.R. 40 Ch. D. 355; 37 W.R. 399

(vii.) **C. A.**—*Authority of Counsel—Infant.*—An infant, suing by her next friend, was non-suited in an action for negligence against her employer. The infant's counsel agreed not to appeal in consideration of the defendant not asking for costs. *Held*, that the compromise was for the benefit of the next friend, and not for that of the infant, and was not binding on her.—*Rhodes* v. *Swithinbank*, 37 W.R. 457.

(viii.) **Q. B. D.**—*Bankruptcy of Plaintiff—Discharge—Abatement—R.S.C.*, 1883, *O.* xvii., *rr.* 1-4.—After the defence in an action had been delivered the plaintiff became bankrupt. He afterwards obtained his discharge, and the right of action, which had passed to the official assignee, was reassigned to him. *Held*, that the cause of action continued, and the action did not become abated by reason of the bankruptcy.—*Barker* v. *Johnson*, 60 L.T. 64.

(ix.) **C. A.**—*Change of Solicitor—Record—Notice to Associates' Department—R.S.C.*, 1883, *O.* vii., *r.* 3.—Where the solicitor for the plaintiff was changed after the close of the pleadings, but notice not having been

given to the Associates' Department, the name of the solicitor on the record was not changed, the Judge at the trial dismissed the action with costs, and the Divisional Court refused to restore it except on terms of the plaintiff paying all the costs wasted. *Held*, that the new solicitor ought to have given such notice, and that the Court of Appeal would not interfere with the order.—*Hunt* v. *Fineburg*, L.R. 22 Q.B.D. 259; 58 L.J. Q.B. 167; 37 W.R. 311.

(i.) **C. A.**—*Costs — Scale of Taxation — R.S.C.*, 1883, *O.* lxv., *r.* 12.—Where a plaintiff has recovered less than £50 in an action in the High Court, and has successfully resisted a counter-claim for more than £50, the costs of the claim must be on the County Court scale, and the costs of the counter-claim on the High Court Scale.—*Amon* v. *Bobbett*, 37 W.R. 329.

(ii.) **Ch. D.**—*Costs—County Court Scale.* Action brought to restrain excavation by the defendant to the injury of the plaintiff's premises. Injunction granted, and £5 damages awarded. *Held*, that if the relief could have been obtained in the County Court, the costs must be on the County Court scale.—*Cooper* v. *Streeter*, 60 L.T. 95.

(iii.) **P. D.**—*Costs—Divorce—Co-respondent—Rescission of Decree.*—A decree *nisi* having been obtained with costs against the co-respondent, the Queen's Proctor intervened, and alleged collusion and adultery by the petitioner between the commencement of the suit and the decree *nisi*. The petitioner filed no answer, and the decree *nisi* was rescinded. *Held*, that so much of the decree *nisi* as condemned the co-respondent in costs ought to be rescinded.—*Hechler* v. *Hechler*, 58 L.J. P. 27.

(iv.) **Ch. D.**—*Costs.—Redemption Action—Originating Summons—R.S.C.*, 1883, *O.* lv., *r.* 5*a*.—The plaintiff obtained judgment in a redemption action, in which the defendant disputed his title to redeem, and denied tender by the plaintiff. *Held*, that the plaintiff was entitled to such costs as he would have been entitled to on a contested originating summons, attended by counsel, including the costs of the witnesses examined in Court to prove the plaintiff's title and the tender.—*Johnson* v. *Evans*, 60 L.T. 29.

(v.) **Ch. D.**—*Costs — Trespass—Discretion of Judge — County Court Act*, 1867, *ss.* 5, 12—*County Courts Act*, 1888, *s.* 116—*R.S.C.*, 1883, *O.* lxv., *rr.* 1, 12.—An action for an injunction to restrain a trespass was tried in the High Court, although the value of the property in dispute was within the County Court limit. After a trial of four days the plaintiff was awarded £5 damages. *Held*, that the action had proved to be a proper one to be disposed of in the High Court, and that the Court would therefore, in the exercise of its discretion, allow High Court costs.—*Williams* v. *Allen*, 60 L.T. 103.

(vi.) **Q. B. D.**—*Counter-claim—Reply to—Default—R.S.C.*, 1883, *O.* xxiii., *r.* 4; *O.* xxvii., *r.* 11.—When a plaintiff fails to reply to a counter-claim, the defendant must move for judgment on it.—*Higgins* v. *Scott*, 58 L.J. Q.B. 97.

(vii.) **C. A.**—*County Court—County Courts Act*, 1888, *s.* 65—*Action for Sum between £50 and £100—Retrospective.*—Sec. 65 of the County Courts Act, 1888, is retrospective, and authorises an action of contract, in which a sum between £50 and £100 is claimed, to be remitted for trial to the County Court in which the action, if it had been a County Court action, might have been commenced.—*Curtis* v. *Stovin*, L.R. 22 Q.B.D. 513; 58 L.J. Q.B. 174; 37 W.R. 315.

(i.) **Q. B. D.**—*Damage by Collision—Action by Tow against Tug—Preliminary Acts—R.S.C.*, 1883, *O.* xix., *r.* 28.—The plaintiffs employed the defendant's tug to tow their barge. While in tow the barge was brought into collision with another vessel, and lost. In an action for damages for negligence, *held*, that it was not a case where preliminary acts should be ordered.—*Armstrong* v. *Gaselee*, L.R. 22 Q.B.D. 250; 58 L.J. Q.B. 149; 59 L.T. 891; 37 W.R. 462.

(ii.) **Q. B. D.**—*Damage by Collision—Preliminary Acts—R.S.C.*, 1883, *O.* xix., *r.* 28.—The plaintiff had goods on a barge which was sunk by the defendants' vessel. He sued the defendants for damage to his goods. *Held*, that the plaintiff must file preliminary acts.—*Secretary for India* v. *Hewitt*, 60 L.T. 334.

(iii.) **Ch. D.**—*Discovery—Action for—Aid of Foreign Proceedings.*—The Court will not entertain an action for discovery in aid of proceedings in a foreign Court, and the statement of claim in such an action will be struck out.—*Dreyfus* v. *Peruvian Guano Co.*, 60 L.T. 216; 37 W.R. 394.

(iv.) **Q. B. D.**—*Discovery—Action of Penalty.*—An action for treble damages for pound-breach is an action for a penalty, and the plaintiff is not entitled to discovery.—*Jones* v. *Jones*, L.R. 22 Q.B.D. 425; 58 L.J. Q.B. 178; 37 W.R. 479.

(v.) **P. D.**—*Divorce—Application to Proceed without Citing Co-respondent.*—Where a husband, petitioning for divorce, alleged that his wife had committed adultery with A. and B., but on making enquiries found no evidence against B. except an admission by the wife, his application to proceed without citing B. as a co-respondent was refused.—*Payne* v. *Payne*, 60 L.T. 238.

(vi.) **C. A.**—*Divorce—Restitution of Conjugal Rights—Written Demand—Divorce Rules*, *r.* 175.—Previously to the filing of a petition by a wife for restitution of conjugal rights, the petitioner's solicitor wrote to her husband requiring him to return to cohabitation. *Held*, that such demand was insufficient, not on the ground that it was not signed by the petitioner personally, but on the ground that there should have been a previous conciliatory letter in terms likely to lead to friendly negotiation, stating the wife's willingness to return to cohabitation. (*See* Vol. **14**, p. 47, iii).—*Field* v. *Field*, L.R. 14 P.D. 26; 58 L.J. P. 21; 59 L.T. 880.

(vii.) **C. A.**—*Double Action—Vexatious Proceedings.*—The owners of the British ship R. and the owners of her cargo sued the German ship X. for damages for collision in the German Consular Court at Constantinople. An order was made in the action for the arrest of the X., or for bail, subject to the plaintiff's giving security. Security was not given, but the owners of the X. gave bail. Subsequently, the X. being in this country, the owners of the cargo on the R. commenced an action *in rem* against the X. for the same cause of action, and arrested her. The limit of the liability of the X. in the Consular Court was less than the limit of her liability in this country. *Held*, that the bail in the Consular Court having been given without the plaintiffs having given security, was given voluntarily and not under compulsion, and that there was nothing vexatious or contrary to good faith in the commencement of a second action in this country.—*The Reinbeck*, 60 L.T. 209.

(viii.) **Ch. D.**—*Evidence—Adjourned Summons—Affidavits Filed after Time Fixed.*—On the hearing of a summons adjourned into Court from chambers, affidavits filed after the time fixed by the chief clerk for filing evidence cannot be used without special leave from the judge or the chief clerk.—*Chifferiel* v. *Watson*, 58 L.J. Ch. 137.

(i.) **C. A.**—*Equitable Execution—Judicature Act*, 1873, *s.* 25, *sub-s.* 8.—A receiver ought not to be appointed by way of equitable execution of a judgment when there is no impediment in the way of obtaining execution in the ordinary course of law by *fi. fa.* or attachment of debts.—*Manchester and Liverpool Banking Co.* v. *Parkinson*, L.R. 22 Q.B.D. 173; 37 W.R. 264.

(ii.) **C. A. & Q. B. D.**—*Execution—Receiver—Officer's Pension—Commutation Moneys—Army Act*, 1881, *s.* 141.—Money received by an officer in Her Majesty's forces for commutation of his retired pay is not within the prohibition against alienation of a pension, and a judgment creditor is entitled to have a receiver appointed of such money, but not of a sum arising out of retired pay, and standing to the credit of the officer.—*Crowe* v. *Price*, L.R. 22 Q.B.D. 429; 60 L.T. 57; 37 W.R. 424.

(iii.) **Q. B. D.**—*Garnishee Order—Affidavit on Application for—R.S.C.*, 1883, *O.* xlv., *r.* 1.—On an application for a garnishee order, it is sufficient for the affidavit to state that the deponent is informed and believes that the garnishee is indebted to the judgment debtor.—*Coren* v. *Barne*, L.R. 22 Q.B.D. 249; 60 L.T. 303; 37 W.R. 415.

(iv.) **Ch. D.**—*Injunction—Undertaking as to Damages—Counsel—Limited Company.*—The undertaking as to damages, which is required when the plaintiff obtains an injunction *ex parte*, is properly given by the plaintiff's counsel, although the plaintiff is a limited company.—*Manchester and Liverpool Banking Co.* v. *Parkinson*, 60 L.T. 47.

(v.) **Q. B. D.**—*Interrogatories—Order to Answer—Service whether Necessary—R.S.C.*, 1883, *O.* xxxi., *r.* 21; *O.* lii., *r.* 13.—The defendant, in an action for recovery of land, was ordered to answer interrogatories within two days, in default his defence to be struck out and judgment signed against him. *Held*, that service of the order was not necessary.—*Farden* v. *Ritcher*, 60 L.T. 304.

(vi.) **C. A.** *Joint Tort-Feasors—Severance of Defence—Costs.*—Decision of Q. B. D. (*see* Vol. **14**, p. 46, v.), affirmed.—*Stumm* v. *Dixon*, L.R. 22 Q.B.D. 529; 58 L.J. Q.B. 183; 37 W.R. 457.

(vii.) **Ch. D.**—*Judgment Law Amendment Act—Contingent Reversionary Equitable Interest—Form of Order.*—An annuity to be raised for A., in case of his surviving B., out of the rents and profits of land, can be sold under the Judgment Law Amendment Act. The order should not contain an order for payment by the debtor, and should direct the chief clerk to distinguish which, if any, liens, charges, or incumbrances have been created prior, and which, if any, subsequent to the delivery of the lands and property in execution, and which, if any, have arisen under or by virtue of any judgment, statute, or recognizance, and the order should direct the sale of the lands and property, free from all liens, charges, or incumbrances which have been created subsequent to the delivery in execution, or have arisen (whether before or after such delivery) by reason of any judgment, statute, or recognizance, and also free from the incumbrances of such other incumbrancers as shall consent to the sale, but subject to the incumbrances of such other incumbrancers as shall not consent.—*In re Cooper*, 60 L.T. 95; 37 W.R. 330.

(viii.) **C. A.**—*Leave to Appeal after Time—R.S.C.*, 1883, *O.* lviii., *r.* 15.—A. sued a number of defendants, including X., Y., and Z. to recover tithes, and obtained judgment against all the defendants. Some of the defendants, but not X., Y., or Z., appealed, and the decision was affirmed. There was then an appeal to the House of Lords, which reversed the decision. X., Y., and Z. now applied for leave to appeal out of time from the decision of the Chancery Division. It appeared that on the faith of X., Y., and Z. having abandoned their right to appeal,

certain sales had taken place, and Acts of Parliament obtained, which had altered the position of A., and had given rights to other parties. *Held*, that leave should not be given. *Semble*, that independently of the special circumstances of the case, leave to appeal out of time should not be granted to a litigant who has elected to abide by the judgment below, except on some special ground, such as surprise, mistake, or fraud.—*Esdaile* v. *Payne*, 59 L.T. 804 & 910; 37 W.R. 309.

(i.) **Ch. D.**—*Order in Chambers—Motion to Discharge—Further Evidence.* —Where a motion is made in Court to discharge an order made by a Judge in chambers on a summons which has been heard by the Judge personally, evidence, which was not before the Judge in chambers, will not be received without leave.—*Rouse* v. *Tribe*, 39 L.T. 887.

(ii.) **Ch. D.**—*Partition Action—Proof of Title.*—In a partition action, unless the property is small, and the title simple, the title ought not to be proved in Court.—*Hawkins* v. *Herbert*, 60 L.T. 142; 37 W.R. 300.

(iii.) **C. A.**—*Particulars—Libel.*—Decision of Q. B. D. (*See* Vol. **14**, p. 46, viii.) affirmed.—*Gouraud* v. *Fitzgerald*, 37 W.R. 265.

(iv.) **C. A.**—*Pleading—Amendment at Conclusion of Evidence.*—Decision of Ch. D. (*see* Vol. **14**, p. 47, i.) affirmed.—*Lowther* v. *Heaver*, 60 L.T. 310; 37 W.R. 465.

(v.) **Ch. D.**—*Pleading—Particulars—R.S.C.*, 1885, *O.* xix, *rr.* 6, 7.—Action against an association which was in liquidation and its liquidator, alleging that an order which had been obtained by the liquidator, postponing payment of a debt due from the defendant association to the plaintiff association, had been obtained at the instigation of the directors of the plaintiff association, who were shareholders in the defendant association, and had instigated and concurred in the application for the order for the purpose of escaping calls which would be made on them if the claim of the plaintiff association were enforced, and alleging that the liquidator and the directors of the defendant association were aware of the improper motives which actuated the directors of the plaintiff association. *Held*, that the plaintiffs must give particulars stating whether the alleged instigation was verbal or in writing, and if verbal, by whom it was made, and if in writing, the date of such writing; and also give particulars of the improper motives which were alleged to have actuated the directors of the plaintiff association.—*Briton Medical and General Life Association* v. *Britannia Fire Association*, 59 L.T. 888.

(vi.) **Ch. D.**—*Pleading—Embarrassing—Separate Causes of Action—R.S.C.*, 1883, *O.* xviii., *r.* 1; *O.* xix., *r.* 27; *O.* xxvi., *r.* 1.—An action was commenced by the plaintiffs against the defendants for infringement of a patent, and was discontinued in consequence of evidence adduced by the defendants on interlocutory proceedings; and the plaintiffs paid the costs of the action. The plaintiffs then commenced a second action for the same object. The statement of claim alleged that the plaintiffs had discovered that the defendant's evidence in the former action was false, and contained a claim (which was not in the writ) that the second action might be treated as supplemental to the former action, and that the defendants might be ordered to repay the costs paid by the plaintiffs in the former action, and to pay the costs of it to the plaintiffs. *Held*, that the action could not be treated as supplemental to the former action, that the two causes of action ought not to be joined, that the statement of claim ought not to include a cause of action not mentioned in the writ, and that the paragraphs relating to such separate cause of action ought to be struck out as embarrassing.—*The United Telephone Co.* v. *Tasker*, 59 L.T. 852.

(i.) **Q. B. D.**—*Pleading—Time—Defence to Counter Claim—R.S.C.*, 1883, *O.* xxi., *r.* 6; *O.* xxiii., *rr.* 1, 4.—A reply by way of a defence to a counter-claim may be delivered twenty-one days after the counter-claim. —*Rumley* v. *Winn*, L.R. 22 Q.B.D. 265; 58 L.J. Q.B. 128; 60 L.T. 32; 37 W.R. 285.

(ii.) **Q. B. D.**—*Production of Documents—R.S.C.*, 1883, *O.* xxxvii., *r.* 7—*Documents in the Hands of Persons not Parties to the Action.*—The Court has no jurisdiction to give "liberty to inspect the books" of a person not party to the action, or to order "the production of such books at the office of the plaintiff's solicitors." —*Straker* v. *Reynolds*, L.R. 22 Q.B.D. 262; 58 L.J. Q.B. 180; 60 L.T. 107; 37 W.R. 379.

(iii.) **Q. B. D.**—*Prohibition—Affidavits—Title—Crown Office Rules*, 1886, *r* 7. —Affidavits in support of an application to the Crown side for a prohibition must be intituled "In the High Court of Justice, Queen's Bench Division," and if they are not so intituled the Court may refuse to hear the application.—*Reg.* v. *Plymouth and Dartmoor Railway Co.*, 37 W.R. 334.

(iv.) **Ch. D.**—*Receiver—Further Consideration—Minutes.*—When a receiver has been appointed generally, it is not necessary on further consideration to insert in the minutes a direction to continue the receiver.—*Underwood* v. *Underwood*, 37 W.R. 428.

(v.) **C. A.**—*Reference to Official Referee—"Question arising in any Cause or Matter"—Judicature Act*, 1873, *s.* 56.—A question cannot be referred to an official or special referee unless it is one which must necessarily arise in a cause or matter. Therefore, in an action for rescission of partnership articles on the ground of alleged misrepresentation of the value of the defendant's practice, *held*, that until the letter which contained the alleged misrepresentation had been judicially construed, and the nature of the representations thereby made determined, there was no power to refer it to a referee to report what was the value of the defendant's practice.—*Weed* v. *Ward*, 60 L.T. 208; 37 W.R. 406.

(vi.) **C. A.**—*Revivor—Death of one of Several Joint Plaintiffs before Judgment—R.S.C.*, 1883, *O.* xvii., *r.* 4.—In an action for deceit brought by fifty-four plaintiffs suing jointly, two of the plaintiffs died before the judgment. After final judgment their executors applied for an order that the proceedings might be carried on. *Held*, that it was not a case in which such an order ought to be made. *Quære*, whether such an order can be made after final judgment. — *Arnison* v. *Smith*, 60 L.T. 206; 37 W.R. 405.

(vii.) **Ch. D.**—*Service out of Jurisdiction.*—The plaintiff in an action to restrain infringement of a trade mark resided in England, the defendant company had its registered office in Scotland, and branches in England, one of them being in the town where the plaintiff resided. *Held*, that the writ might be served out of the jurisdiction.—*Burland* v. *Roxburgh Oil Co.*, 37 W.R. 470.

(viii.) **Ch. D.**—*Specific Performance—Judgment for Payment by Defendant—Order—Execution.*—The judgment in a vendor's action for specific performance ordered an account of what was due from the defendant, and that he should pay the amount to the plaintiff at a time and place to be appointed, and that the plaintiff should deliver to him the conveyance and title deeds. The amount due was certified, and the time and place appointed. The plaintiff attended at the time and place with the conveyance and title deeds, but the defendant did not attend. *Held*, that an order for payment into Court would not be made, but that the plaintiff was entitled to a four or seven days' order for payment to him

personally, which order would direct delivery of the conveyance and title deeds. On such order execution, by *fi. fa.*, elegit, or writ of sequestration, will issue.—*Robinson* v. *Galland*, 37 W.R. 396.

(i.) **Ch. D.**—*R.S.C.*, 1883, *O.* lv., *r.* 13*a*—*Appointment of New Trustees—Vesting Order—Trustee Act*, 1850, *ss.* 32, 34.—A vesting order may be obtained by summons in chambers on the appointment of new trustees; but in a complicated case a petition for the appointment of new trustees and a vesting order may be presented.—*In re Morris's Settlement Trusts*, 60 L.T. 96; 37 W.R. 317.

Principal and Agent:—

(ii.) **Q. B. D.**—*Employment to make Bets—Failure of Agent—Right of Action by Principal.*—The plaintiff employed the defendant to make certain bets for him as his agent on commission. The defendant, in breach of his engagement, failed to make the bets. Had the bets been made, and the sums won and lost in respect of them been received and paid by the defendant, the plaintiff would have been entitled to a balance. *Held*, that the plaintiff had no right of action to recover such balance.—*Cohen* v. *Kittell*, 37 W.R. 400.

(iii.) **C. A.**—*Indemnity of Agent—Stock Exchange—Defaulting Broker.*—The plaintiff, a broker on the Stock Exchange, was employed by the defendant to buy stock for him for the account of September 27th. By the defendant's directions the stock was carried over to the account of October 14th. On October 12th the plaintiff was declared a defaulter, and his transactions were closed at the prices of the day, in accordance with the rules of the Stock Exchange. The defendant agreed to accept such prices. *Held*, that the defendant was liable to indemnify the plaintiff against the loss on the transactions so carried over by him as agent for the defendant.—*Hartas* v. *Ribbons*, L.R. 22 Q.B.D. 254; 58 L J. Q.B. 187; 37 W.R. 278.

Principal and Surety:—

(iv.) **Q. B. D.**—*Discharge of Surety—Connivance of Obligee at Breach of Conditions of Bond.*—The defendants were sued on bonds given by them as sureties for the due performance by X. of his duties as collector and receiver of rates. The plaintiffs had permitted X. to retain moneys in his hands for more than a week (contrary to the statute, and to the conditions of the bonds), and had allowed him to mix the proceeds of different rates. *Held*, that the acquiescence by the plaintiffs in the irregular method of accounting was not such connivance as to discharge the sureties. *Held*, also, that on the construction of one of the bonds which described X. as "collector and receiver of rates," the sureties were liable for his failure to pay over the amounts collected by him, even if the rates were invalid.—*Durham (Mayor of)* v. *Fowler*, L.R. 22 Q.B.D. 394.

Privy Council:—

(v.) **Q. B. D.**—*Powers—Contagious Diseases (Animals) Act*, 1878, *s.* 5, *sub-ss.* i., ii., *and* iii.; *s.* 32, *sub-ss.* xxxii., xxxiii—*Contagious Diseases (Animals) Act*, 1886, *s.* 8.—The Rabies Order of 1887 is within the power of the Privy Council.—*Bellhouse* v. *Leighton*, 58 L.J. M.C. 67.

Railway:—

(vi.) **C. A.**—*Compulsory Purchase—Building Agreement—Extension of Time—Declaration of Interest—Jurisdiction.*—Decision of Ch. D. (*see* Vol. **13**, p. 19, iii.) affirmed.—*Birmingham and District Land Co.* v. *L. & N.W.R.*, L.R. 40 Ch. D. 268.

(i.) **Q. B. D.**—*Compulsory Purchase—Compensation—Issue before Judge and Jury—New Trial—Regulation of Railways Act*, 1868, *ss.* 41, 43.—Where the amount of compensation on a compulsory purchase has been decided on an issue tried before a judge and jury, there is no power to order a new trial.—*Birmingham and District Land Co.* v. *L. & N.W.R.*, L.R. 22 Q.B.D. 435; 60 L.T. 317; 37 W.R. 285.

(ii.) **Q. B. D.**—*Railway Commissioners—Jurisdiction—Excessive Charges—Railway and Canal Traffic Act*, 1854, *s.* 2—*Regulation of Railways Act*, 1873.—The jurisdiction of the Railway Commissioners is confined to cases to which the ordinary legal remedies do not apply, and does not extend to a refusal of a railway company to carry goods except on prepayment of charges in excess of the authorised rates.—*Reg.* v. *Distington Iron Co.*, 37 W.R. 446.

(iii.) **Ch. D.**—*Widening—New Line—Deviation—Railways Clauses Act*, 1845, *s.* 15.—A railway company taking land for widening their line must keep entirely within the limits of deviation, and are not entitled, as in the case of a new line, to place the *medium filum viæ* on the extreme limit of deviation. Where a company had taken land in excess of their powers, but no special damage to the landowner had been proved, *held*, that the only remedy was by information.—*Finck* v. *L. & S.W.R.*, 37 W.R. 375.

Registration:—

(iv.) **Q. B. D.**—*Joint Occupiers—Reform Act*, 1832, *ss.* 27, 29—*Representation of the People Act*, 1867, *s.* 3—*Representation of the People Act*, 1884, *s.* 5.—The claimants claimed in respect of "house and land joint." They occupied a house which they rented at upwards of £20 a year, with no land attached except a garden. One of the claimants' names was on the overseers' occupiers' list for the same house. *Held;* that the claimants were entitled to be registered.—*Druitt* v. *Gossling*, 58 L.J. Q.B. 109; 60 L.T. 325.

(v.) **Q. B. D.**—*Lodger's Claim—Date of Declaration—Representation of the People Act*, 1867, *s.* 30, *sub-s.* 2—*Parliamentary and Municipal Registration Act*, 1878, *ss.* 22, 23—*Registration Act*, 1885, *s.* 18, *Sched.* 3, *Form H, No.* 2.—A. sent in a claim to be placed on the old lodger list, in which the declaration of residence for twelve months prior to July 15 and the attestation were respectively dated July 9. *Held*, that the claim was bad on the face of it.—*Jones* v. *Kent*, L.R. 22 Q.B.D. 204; 58 L.J. Q.B. 106; 60 L.T. 320; 37 W.R. 303.

(vi.) **Q. B. D.**—*Lodger Franchise—Notice of Claim—Date—Registration Act*, 1885, *s.* 18, *Sched.* 3. *Form H, No.* 2.—A notice of claim was delivered by a lodger claimant, omitting the date of attestation. *Held*, that the omission was material, and the claim invalid.—*Smith* v. *Chandler*, L.R. 22 Q.B.D. 208; 58 L.J. Q.B. 103; 60 L.T. 327; 37 W.R. 351.

(vii.) **Q. B. D.**—*Notice of Objection—"Mistake"—Amendment—County Electors Act*, 1888, *s.* 4, *sub-s.* 1—*Parliamentary and Municipal Registration Act*, 1878, *s.* 15, *sub-s.* 2; *s.* 28, *sub-s.* 2—*Registration Act*, 1885, *s.* 18, *Sched.* 3, *Form I., No.* 2.—The occupiers' list of voters for a borough was made out in divisions, and A.'s name was in Division One, which contained the names of persons entitled to be registered both as parliamentary voters and as county electors. A notice of objection was sent to him as follows: "I hereby give you notice that I object to your name being retained on the occupiers' list of parliamentary voters for the borough of X., and as a county elector for the county of Y." *Held*, that the defect (if any) was a mistake, and that the

revising barrister could amend by inserting the words "Division One" after "Occupiers' List." *Semble*, that the notice was good without amendment.—*Hartley* v. *Halse*, L.R. 22 Q.B.D. 200; 58 L.J. Q.B. 100; 60 L.T. 322; 37 W.R. 302.

Revenue :—

(i.) **Q. B. D.**—*Duty on Bodies Corporate—Exemption—Trade or Business—Customs and Inland Revenue Act*, 1885, *s.* 11, *sub-s.* 5.—A body licensed by the Board of Trade as an association with limited liability and carrying on a business is exempt from duty, although its profits are by its memorandum of association destined for a particular purpose, and such body is accordingly not bound to render accounts of its property. —*In re Incorporated Council of Law Reporting*, L.R. 22 Q.B.D. 279; 58 L.J. Q.B 90; 37 W.R. 382.

(ii.) **C. A. & Q. B. D.**—*Income Tax—"Charitable Purposes"—Missions.*—Lands were held on trust to apply the rents and profits for the maintenance of missions, the education of children of missionaries, and the support of houses for aged persons. *Held*, that such purposes were "charitable."—*Reg.* v. *Commissioners for Income Tax*, L.R. 22 Q.B.D. 296; 58 L.J. Q.B. 196; 59 L.T. 832; 37 W.R. 294.

(iii.) **C. A.**—*Income Tax—County Lunatic Asylum—Medical Officer's Apartments*—5 *&* 6 *Vict.*, *c.* 35—16 *&* 17 *Vict.*, *c.* 34, *Sched. A.—Lunatic Asylums Act*, 1853.—Decision of Q. B. D. (*see* Vol. 14, p. 19, iii.)—affirmed.—*Bray* v. *Lancaster Justices*, L.R. 22 Q.B.D. 484; 58 L.J. M.C. 54; 57 W.R. 392.

(iv.) **C. A.**—*Income-Tax—Investments made in carrying on Business—Income Tax Act*, 1842, *ss.* 102, 163—*Income Tax Act*, *s.* 2, *Sched. C. & D.*—Decision of Q. B. D. (*see* Vol. 14, p. 19, ii.) affirmed.—*Clerical, Medical and General Life Assurance Society* v. *Carter*, L R. 22 Q.B.D. 444; 37 W.R. 346.

(v.) **Q. B. D.**—*Income Tax—Loan for less than a Year—Interest—Deduction of Tax*—16 *&* 17 *Vict.*, *c.* 34, *s.* 40.—A customer borrowing money from a banker for a period less than a year, may deduct income tax from the interest, and if such deduction is made, the banker is not liable to pay income tax on such interest.—*Goslings* v. *Blake*, L.R. 22 Q.B.D. 153; 60 L.T. 329.

Sale of Goods :—

(vi.) **C. A.**—*Delivery Order—Estoppel.*—F., a broker, purported to sell for the defendants to unnamed principals goods, which he subsequently purported to sell, at a different price, to the plaintiffs. He was not the agent of either the plaintiffs or the defendants, and neither plaintiffs nor defendants had notice of his dealings with the other party. He then obtained from the defendants, who were merchants and wharfingers, an order for delivery of the goods to the plaintiffs. The plaintiffs, on receipt of the order, paid part of the price to F., who absconded with it. *Held*, that the defendants were not estopped from denying the plaintiffs' title to the goods, and that the plaintiffs had no cause of action against them.—*Gilman* v. *Carbutt*, 37 W.R. 437.

Salmon Fishery :—

(vii.) **Q. B. D.**—*Using Rod without Licence—Intention to catch Trout—Salmon Fishery Act*, 1865, *ss.* 33, 35, 36.—A person fishing with a rod and line in a river to which the Salmon Fishery Act applies, without licence, but with no intention of catching trout or salmon, is not guilty of an offence.—*Marshall* v. *Richardson*, 58 L.J. Q.B. 45.

Settled Land.—*See* Lunatic.

Settlement:—

(i.) **Ch. D.**—*Life Interest Determinable on Alienation—Receiver.*—By a marriage settlement, a fund, the propery of the husband, was settled on trust to pay the income to him for life "or till he shall become a bankrupt, or shall assign, charge, or incumber the said income, or shall do or suffer something whereby the same or some part thereof would, through his act, default, or by operation of law, if belonging absolutely to him, become vested in or payable to some other person or persons." *Held*, that the husband's interest was determined on a judgment creditor obtaining an order for a receiver of the income.—*Detmold* v. *Detmold*, 37 W.R. 442.

Sewer:—

(ii.) **Q. B. D.**—*Thames Navigation Act*, 1866, *ss.* 64, 65—*Pollution of River—Prescriptive Right to use Sewer.*—Where a local board permit sewers to be used by inhabitants who have acquired a prescriptive right to use them, they do not "cause or suffer" sewage to flow into the Thames, and cannot be convicted of a misdemeanour.—*Reg* v. *Staines Local Board*, 60 L.T. 261.

Sheriff:—

(iii.) **C. A.** — *Wrongful Seizure — Misdirection by Execution Creditor — Liability.*—The sheriff, being misled by an indorsement put on the writ by the solicitor of the execution creditor, seized the goods of the wrong person. *Held*, that the execution creditor was liable in an action of trespass.—*Morris* v. *Salberg*, 37 W.R. 469.

Ship:—

(iv.) **C. A.**—*Action in Rem—Notice—*6 *& 7 Wm. IV., ch. c., s.* 8 —By a personal Act it was provided that no action in which the A. company should be liable for damage to any ship should be brought against such company, except after one month's notice in writing. *Held*, that the enactment did not apply to an action in rem against a ship owned by the company.—*The Longford*, L.R. 14 P.D. 34; 37 W.R. 372.

(v.) **P. D.**—*Authority of Master—Action for Damage to Ship and Cargo.*—*Semble*, that when a ship and her cargo are damaged by collision in or near to a foreign port, the ship's master has authority to institute an action in rem against the offending ship in such foreign port on behalf of both ship and cargo, and the owners of the cargo cannot, while the action is pending in their names, be allowed to deny his authority.—*The Reinbeck*, 60 L.T. 209.

(vi.) **C. A.**—*Collision—Regulations for Preventing Collisions, Art.* 11.—Decision of P.D. (*See* Vol. **13**, p. 92, ii.) affirmed.—*The Palinurus*, 37 W.R. 266.

(vii.) **P. D.**—*Collision — Thames Rules—Rules* 6 *&* 7.—A sailing barge dredging down the river with her anchor down to check her way, is neither a "sailing vessel under way," nor a "vessel at anchor."—*The Indian Chief*, L.R. 14 P.D. 24; 58 L.J.P. 25; 60 L.T. 240.

(viii.) **C. A.**—*Insurance—Mutual Association—Policy Effected by Managing Owner—Liability of Co-owners.*—The memorandum of association of a mutual marine insurance association, the plaintiffs, stated that its objects were the insurance of ships belonging to its members, or in which members had shares. The articles provided that every person

should be deemed to have agreed to become a member who should insure a ship with the association. H., the managing owner of a ship in which the defendants held shares, insured it with the association. The defendants had authorised H. to insure the ship with mutual associations, but had no knowledge of the plaintiff association. The policy was expressed to be effected by H. in his own name and in the name of all persons interested, and the consideration was stated to be the contributions to be paid from time to time by the assured for losses to other ships mutually assured in the association. *Held*, in an action for contributions in respect of other ships insured with the association, that the defendants were the assured within the meaning of the policy, whether they were members of the association or not, that they were liable on the terms of the policy to pay the contributions, and that the association had power to grant such a policy. — *Great Britain* 100 A 1 *Steamship Insurance Association* v. *Wyllie*, 37 W.R. 407.

(i.) **C. A.**—*Insurance—Warranty—Iron Cargo—Steel.*—A policy of marine insurance contained the following warranty:—"Warranted no iron or ore or phosphate cargo exceeding net register tonnage." The ship was lost through the perils insured against, having on board a cargo of steel blooms exceeding the net register tonnage. *Held*, that the word "iron" in the warranty included steel, in the absence of proof that among men engaged in insurance business the word in such a warranty had acquired a meaning distinct and separate from steel.—*Hart* v. *Standard Marine Insurance Co.*, L.R. 22 Q.B.D. 499; 37 W.R. 366.

(ii.) **C. A.**—*Shares—Purchase—Liability—Co-owners.*—Decision of P. D. (*see* Vol. 13, p. 93, iii.) reversed.—*The Vindobala*, 37 W.R. 409.

(iii.) **P. D.**—*Grounding of Vessel—Liability of Dock Owners.*—The plaintiff's vessel was, with the consent of the foreman docksman of the defendants, placed in a lock which led into the defendants' dock, for the purpose of being grounded for repairs. On taking the ground she was damaged owing to the state of the bottom of the lock. *Held*, that the defendants were not bound to have the bottom of the lock in the same condition as that of a dry dock; that the user of the lock as stated was an extraordinary user; that the docksman had no authority to allow such a user, and that the plaintiff's master ought to have informed himself as to the condition of the bottom of the lock.—*The Apollo*, 60 L.T. 112.

(iv.) **C. A.**—*Vessel Grounding of Necessity—Implied Representation by Wharfinger.*—Decision of P. D. (*see* Vol. 14, p. 53, v.) affirmed.—*The Moorcock*, 37 W.R. 439.

(v.) **P. D.**—*Wharfinger—Representation.*—The plaintiff's ship was ordered by the defendants, the consignees of the ship's cargo, to proceed to the defendants' wharf to discharge. The defendants' traffic manager wrote to the master saying that he could bring the ship to the wharf at a certain time, stating the then depth of water, and asking him to inform the pilot. The ship grounded before she reached her berth, owing to want of water. *Held*, that the traffic manager had no authority to make, and had not made, any representation as to the state of the approach to the wharf, that the cause of damage was the default of the pilot, and that the defendants were not liable.—*The Calliope*, 59 L.T. 901.

See Practice, p. 84, i. and ii.

Solicitor:—

(vi.) **C. A.**—*Action on Bill of Costs—Counter-claim for Negligence—Non-appearance of Defendant—Judgment.*—A solicitor brought an action on his bill of costs. The defendant counter-claimed for damages for

negligence, but did not appear at the trial. The solicitor proved that he had rendered the services and made the disbursements for which he claimed. *Held*, that the plaintiff was entitled to the costs of the action, and to payment of his bill after taxation, and that the counter-claim should be dismissed with costs.—*Lumley* v. *Brooks*, 37 W.R. 454.

(i.) **C. A.**—*Gift by Client—Right to Set Aside—Right of Personal Representative.*—Decision of Ch. D. (*see* Vol. **14**, p. 21, iv.) affirmed.—*Tyars* v. *Alsop*, 37 W.R. 339.

(ii.) **Ch. D.**—*Costs—Scale Fees—Election—Official Liquidator.*—The official liquidator of a company, on receiving notice from his solicitor of his election to be remunerated according to the old system, ought to apply to the judge for advice before accepting such notice, that the question of the solicitor's remuneration may be considered. Where the official liquidator received such notice and made no objection, the Court refused to vary the taxing master's certificate which allowed costs according to the scale.—*In re United Kingdom Land and Building Association*, L.R. 40 Ch. D. 471; 58 L.J. Ch. 132.

(iii.) **H. L.**—*Costs—Sale by Auction—Solicitors' Remuneration Act*, 1881—*General Order, Sched.* 1, *Part* 1.—Where a solicitor is employed to conduct a sale of property by auction, and an auctioneer is employed, who is paid by the client, the solicitor is entitled to charge for work done in connection with the sale, though he is not entitled to the scale fee for conducting the sale. Decisions of C. A. (*see* Vol. **14**, p. 53, vii.; and Vol. **13**, p. 55, viii.) reversed; *re Faulkner* (*see* Vol. **13**, p. 55, vii.) approved.—*Parker* v. *Blenkhorn*; *Newbould* v. *Bailward*, 59 L.T. 906; 37 W.R. 401.

(iv.) **Ch. D.**—*Costs—Scale Charges—Abortive Sale by Auction—General Order, Clause* 2 (*c.*); *Schedule* 1, *Part* 1, *rr.* 2 *and* 11.—Where there was an abortive sale by auction, the auctioneer being paid a lump sum by the client, and the property was sold afterwards by private contract, the same solicitors acting throughout, *held*, that the taxing master's decision that all the solicitors' charges in connection with the abortive sale were excluded by Rule 11 was wrong.—*Burd* v. *Burd*, 58 L.J. Ch. 170; 60 L.T. 228; 37 W.R. 428.

(v.) **Ch. D.**—*Costs—Taxation—Third Parties—Solicitors Act*, 1843, *s.* 41. There is no jurisdiction, except under the Solicitors Act, to tax a solicitor's bill at the instance of third parties, as in the case of beneficiaries under a will applying to tax the bill of a solicitor employed by the executor, and paid out of the estate.—*Boughton-Leigh* v. *Boughton-Leigh*, L.R. 40 Ch. D. 495; 37 W.R. 282.

(vi.) **Ch. D.**—*Taxation—Right to Elect—General Order*, 1882—*Business Pending—Form of Election.*—A solicitor was employed in certain leases and sales made by order of the Court in an action, a separate order being made in each case. In all cases the business was commenced before December 31st, 1882. On January 2nd, 1883, the solicitor gave notice that, "I propose to charge my costs under Schedule 2." *Held*, that such notice was sufficient in form. *Held*, also, that the several matters must be treated separately, that where any work had been done between December 31st and the notice, such notice was too late, and that as to the other matters there must be an inquiry whether any work had been done between such dates.—*Hill* v. *Spurgeon*, 60 L.T. 254; 37 W.R. 475.

(i.) **Ch. D.**—*Taxation—Bill Delivered Twelve Months—Death of Client—Attorneys and Solicitors Act*, 1843, *s.* 37.—There is no absolute rule preventing any investigation of a solicitor's bill if more than twelve months have passed without objection being made by the client. But such a delay, and, *à fortiori*, a payment on account, will, unless explained, be conclusive against the client's right to tax. Where the client had died after making a payment on account, and had not objected to the bill, which had been delivered more than twelve months before his death, *held*, on the solicitor claiming the balance in an action for administration of the client's estate, that the whole bill ought not to be taxed, but that certain items which the chief clerk considered to require investigation, ought to be referred to the taxing master.—*Cole* v. *Park*, 58 L.J. Ch. 128; 59 L.T. 925.

(ii.) **Ch. D.**—*Receipt of—Conveyancing Act*, 1851, *s.* 56. The production by a solicitor of a deed containing a receipt does not discharge the person paying him, unless he is acting as solicitor for the person to whom the money is expressed to be paid. Actual production of the deed is necessary to effect such discharge.—*Day* v. *Woolwich Equitable Building Society*, L.R. 40 Ch.D. 491; 37 W.R. 461.

(iii.) **Q. B. D.**—*Unqualified—Costs.*—Where a party to an action employs as solicitor an unqualified person, and the proceedings are in fact taken by him, although the solicitor on the record is duly qualified, such party, if successful, cannot recover his costs from the opposite party.—*Irvin* v. *Sanger*, 58 L.J. Q.B. 64; 59 L.T. 894

Tenant for Life :—

(iv.) **Ch. D.**—*Outgoings—Expenses of Making Street—Public Health Act*, 1875, *ss.* 150, 232, 257.—As between tenant for life and remainderman, the frontage owner who is liable for the expenses of making a new street is the owner at the time when the expenses are assessed. A testator, by deed of gift, assigned two houses to his son on trust for the donor for life, he paying all "outgoings," and after his death for the son absolutely. In his will he recited the gift of the houses "which are and will be unincumbered." A new street was made in the testator's lifetime, and the charge on the houses assessed after his death. *Held*, that the recital in the will did not amount to a gift to the son of the amount of the charge.—*Boor* v. *Hopkins*, 37 W.R 319.

(v.) **Ch. D.**—*Protection of Estate—Costs.*—A settled estate was in danger of being broken up owing to foreclosure actions brought or threatened by mortgagees, and the tenant for life had procured the transfer of one mortgage, and had arranged for the transfer of the others, and had incurred costs in relation to such transfers, complete and intended, and in relation to a foreclosure action commenced by one mortgagee. *Held*, in an action by the tenant for life against the remainderman, that the tenant for life was entitled to a charge on the settled estate for such costs, and for any other costs properly incurred in protecting the estate from the claims of the mortgagees, and for the costs of this action.—*More* v. *More*, 37 W.R. 414.

Trade Mark :—

(vi.) **Ch. D.**—*Descriptive Word—Entry on Register—Patents, Designs, and Trade Marks Act*, 1883, *ss.* 74, 90.—In March, 1885, H. began to sell a preparation of herbs under the name of "Herbalin." In June, 1885, M. began to sell a similar article under the name "Herbaline." In 1887, H. registered a mark consisting of a ship and the word "Herbalin." H. brought an action against M. to restrain infringement

of the mark, and M. moved to expunge the word "Herbalin." *Held*, that "Herbalin" was a descriptive word and could not have been registered alone; and that though the word could be registered as part of a trade mark, a note must be entered on the register that H. was not entitled to the exclusive use of the word.—*Humphries* v. *Taylor Drug Co.*, 59 L T. 820.

(i.) **Ch. D.**—*Fancy Word—Foreign Name of Article.*—The foreign name of an article unknown in England, being the word which properly describes the article in the country in which it is produced, cannot, on the article being first imported into England, be registered as a trade mark for such article.—*Davis* v. *Stribolt*, 59 L.T. 854.

(ii.) **Ch. D.**—*Fancy Word—Patents, Designs, and Trade Marks Act*, 1883, s. 64, *sub.-ss.* 1, 72, 73.—An application was made to the Court to allow the registration of the word "Kokoko" in respect of cotton goods. "Kokoko" is the word used by the Chippeway Indians to denote a species of owl. The device of an owl was proved to be commonly used in the cotton trade, and the word "Coco" was also proved to have been used in connection with exported cotton goods, although it had not been registered as a trade mark. *Held*, that as the device of an owl was common property, no foreign word meaning "owl" could be registered. *Held*, also, that "Kokoko" too nearly resembled "Coco" to be entitled to registration.—*Re Jackson Company's Application; Trade Mark "Kokoko,"* 60 L.T. 93.

(iii.) **Ch. D.**—*Name of Place—Rectification of Register.*—A firm of brewers had carried on business at Stone for more than 100 years, and had acquired a reputation for their ales as "Stone Ales." *Held*, that they were entitled to the exclusive use of the term. They had registered "Stone Ales" as an old mark, *held*, that the register ought to be rectified by inserting a disclaimer of the exclusive use of the name "Stone."—*Thompson* v. *Montgomery*. 58 L.J. Ch. 93.

(iv.) **Ch. D.**—*Foreign Mark—Registration—Patents, Designs and Trade Marks Act*, 1883, s. 103, *sub.-ss.* (1) & (3).—A foreign trade mark cannot be registered in this country, unless the application for registration is made within four months after the application for registration abroad. —*In re Californian Fig Syrup Co.*, 37 W.R. 268.

(v.) **Ch. D.**—*Registry in Class—Particular Goods in Class.*—A manufacturer who has registered a trade mark in respect of certain specified goods only in the class under which it is registered, is not protected by the Trade Marks Registration Act, 1875, in respect of its user in connection with other goods in the same class. But if he, *bonâ fide*, uses the same trade mark in connection with other goods, he may still be entitled to protection of the mark under the general law as a symbol whereby such other goods have become known to the public as being of his manufacture.—*Jay* v. *Ladler*, 60 L.T. 27.

Trustee:—

(vi.) **C. A.**—*Disclaimer—Legal Estate in Trust Property.* A deed is not necessary to make effectual a disclaimer of the office of trustee. Where A. being appointed trustee and executor of a will, did not prove the will, and on various occasions stated that he did not wish to act as trustee, *held*, on his attempting, twelve years after the testator's death, to act as trustee, that he had effectually disclaimed the trusteeship, and was not a trustee of the will. *Held*, also, that the legal estate in the trust property never vested in A., and that he ought not to be ordered to convey it to the new trustees appointed.—*Birchall* v. *Ashton*, L.R. 40 Ch. D. 436; 37 W.R. 387.

Vendor and Purchaser :—

(i.) **Ch. D.**—*Equitable Mortgage by Vendor before Completion.*—After entering into a contract for the sale of property, but before the title was accepted by the purchaser, the vendor deposited the title deeds by way of equitable mortgage to secure an advance larger than the amount of the purchase money. The purchase was not completed at the time specified in the contract, but this was not caused by the default of the purchaser. *Held*, that the purchaser was entitled against the equitable mortgagee, as well as against the vendor, to have a conveyance on payment of his purchase money.—*Flinn* v. *Pountain*, 37 W.R. 443.

See Contract, p. 71, ii. Practice, p. 87, viii.

Will :—

(ii.) **Ch. D.**—*Construction—"All my Nephews and Nieces Living at my Death"—Illegitimate Niece—Die in my Lifetime Leaving Issue.*—A testatrix having an illegitimate niece, H., and several legitimate nephews and nieces, of whom some were dead leaving issue at the date of her will, bequeathed to H. a legacy by the description of "my niece," and gave her residue to "all my nephews and nieces living at my death" with a proviso that "if any of my said nephews and nieces die in my lifetime leaving lawful issue," such issue should take their parents' share. *Held*, that H. was not entitled to share in the residue, and that the issue of the nephews and nieces dead at the date of the will were not included in the residuary gift.—*Brown* v. *Brown*, 37 W.R. 472.

(iii.) **Q. B. D.**—*Construction—Contingent Remainder—Vesting in Child when Begotten.*—S., who died in 1819, devised land to his son, R. S., for life, and "from and immediately after his decease unto and to the use of all and every his children which shall then be living, and of their respective heirs and assigns as tenants in common," and in case R. S. should die without leaving lawful issue, or leaving such, and all of them should happen to die under the age of twenty-one without issue, then to T. S.; and he devised all other his real estate to R. S, his heirs and assigns. R. S., in 1827, conveyed all his estate in the devised land for the purpose of destroying the contingent remainders. He had a son, X., who had been begotten before, but was born after such conveyance. *Held*, that X., as soon as he was begotten, took a vested remainder, liable to open and let in after-born children, and subject to be divested in the event of his death under twenty-one, and that the life estate of R. S. and the remainder in fee did not merge so as to destroy the intermediate estate of the children.—*Sulley* v. *Barber*, 59 L.T. 824.

(iv.) **H. L.**—*Construction—Gift of Income—Use and Occupation.*—A testator by will gave his wife a legacy "for her present wants." He gave, devised, and bequeathed to her the rents and income of his freehold, copyhold, and leasehold property at B., and also the rents and profits of his leasehold houses at P., and all other income of his estate, and directed that any money in his house should be invested in her name in consols. He directed that she should "be at liberty out of the proceeds of my surplus residuary estate to erect any monument to my memory which she may please, not exceeding the sum of £300." He gave her all the household effects in his house at E., and desired that she should "have the free use and occupation of the said house," and that an inventory should be made of the household effects. *Held*, that the wife took the properties at B. and P. absolutely, and took a life interest in the house at E. and the residuary estate.—*Coward* v. *Larkman*, 60 L.T. 1.

(i.) **Ch. C.**—*Construction—"Household Effects"—Ejusdem Generis.*—A bequest of "all the household furniture and effects" in and about the testator's residence does not pass jewellery which is in the house.—*Northey* v. *Paxton*, 60 L.T. 30.

(ii.) **C. A.**—*Construction—Intention to Unite Gifts—Codicil.*—Testator devised real estate on certain limitations, and bequeathed chattels on trust to be held and enjoyed as heirlooms by the persons for the time being entitled to the real estate "under the devise thereof hereinbefore contained." He gave a legacy of £20,000 to trustees, on trust for the persons for the time being entitled to the real estate. By a codicil he altered the persons to take the real estate. The codicil contained a column of items, in which were the words, "£20,000 to trustees," and opposite to them the words, "the same." The codicil did not refer to the chattels, and ended, "except as here intimated, I confirm my said will." *Held*, that the will and codicil must be read as one disposition, that the intention was to unite the enjoyment of the legacy and the chattels with the possession of the real estate, and that effect must be given to the intention.—*Dallas* v. *Low*, 37 W.R. 417.

(iii.) **Ch. D.**—*Construction—"Rents, Dividends and Annual Proceeds"—Income or Corpus—Payment of Debts out of Corpus—Recouping out of Income—Gift of Residue of Proceeds of Sale of House.*—Testator gave to M. all the cash in his house after payment of his debts, and directed that in case it should be insufficient, the deficiency should be paid out of the "rents, dividends, and annual proceeds of my estate." He then bequeathed a house to M. for life, and he bequeathed a house, "the P.," to M. on trust for sale, and out of the proceeds he gave a legacy, and as to the residue of such proceeds, "and all other the residue of my real and personal estate," he gave the same to his daughters. *Held*, that "rents, dividends, and annual proceeds" meant income, not corpus; but that the debts having been paid out of corpus, there was no trust to compel M. to recoup the corpus out of her income. *Held*, also that the gift of the residue of the proceeds of "the P." was specific.—*Baldock* v. *Green*, 58 L.J. Ch. 157; 60 L.T. 225; 37 W.R. 300.

(iv.) **Ch. D.**—*Legacies to Two Charities Amalgamated before Death of Testatrix—Public Society—Lapse.*—A testatrix left legacies to two societies, which, after the date of the will, but before the death of the testatrix, were amalgamated; *held*, that the united society was entitled to both legacies. She left a legacy to X. for the benefit of the "Society for Suppressing Cruelty by United Prayer," and for accomplishing its purposes and objects. The society was founded by the testatrix, and had had many members. There were no rules, but the members were required to buy a card, and to use a form of prayer printed on it. The testatrix printed the cards at her own cost, and received the money paid for them, but published no accounts. *Held*, that the testatrix was in fact the society, which came to an end at her death, and that the legacy lapsed. *Held*, also, that it was not a good charitable gift.—*Purday* v. *Johnson*, 60 L.T. 175.

(v.) **Ch. D.**—*Secret Trust—Parol Evidence.*—A testator by his will gave his residuary real and personal estate to A. and B. absolutely, "in the full confidence that they will carry out my wishes in respect thereof." A. and B. survived the testator, but died before the commencement of the action. *Held*, that parol evidence of a conversation, in which the testator told the witness that he had communicated to one of the legatees his wish to benefit a charity, was inadmissible. *Held*, therefore, that A. and B. were bound by no trust, and that their representatives were entitled.—*In re Downing's Residuary Estate*, 60 L.T. 140

(i.) **P. D.**—*Probate—Informal Attestation Clause.*—A **testator made a holograph will, and in place of the attestation clause wrote the words, "Sealed, signed, and delivered in the presence of." The witnesses recognised their signatures, but were unable to remember if the proper formalities had been complied with. Probate was granted, the next-of-kin all consenting in writing**—*In the Goods of Colyer*, **L.R. 14 P.D. 48; 37 W.R. 272.**

(ii.) **P. D.**—*Probate—Revocation of Will.*—**A testator duly executed his will, which was on five sheets, each signed by himself, and initialled by the attesting witnesses. He then took out three sheets, and substistuted three others, which he signed, but which were not attested. He did not alter the date of the will, nor re-sign it, nor was it re-attested.** *Held*, **that the will was not entitled to probate.**—*Treloar* **v.** *Lean*. **L.R. 14 P.D. 49.**

See Tenant for Life. p. 94. iv.

Quarterly Digest

OF

ALL REPORTED CASES,

IN THE

Law Reports, Law Journal Reports, Law Times Reports, and Weekly Reporter,

FOR MAY, JUNE AND JULY, 1889.

By C. H. LOMAX, M.A., of the Inner Temple, Barrister-at-Law.

Accord and Satisfaction:—

(i.) **C. A.**—*Sum Sent in Satisfaction of Larger Claim—Retainer of—Inference of Law.*—If a person sends a sum of money to his creditor on the terms that it is to be taken, if at all, in satisfaction of a larger claim, and the money is kept by the recipient, there is no inference of law that accord and satisfaction is to be implied. It is a question of fact on what terms the sum is kept.—*Day* v. *McLea*, L.R. 22 Q.B.D. 610; 58 L.J. Q.B. 293; 37 W.R. 483.

Administration:—

(ii.) **P. D.**—*Bond—Administrator Pendente Lite—Premium to Guarantee Society.*—In a probate suit where an administrator *pendente lite* had been appointed, and had been ordered to give security in a sum of £10,488, the Court, on the application of an intervener, allowed the administrator to pay out of the estate a premium of £50 to a guarantee society which was willing to enter into the bond, the intervener undertaking to recoup the estate in the event of his failing and being condemned in costs.—*Harver* v. *Harver*, L.R. 14 P.D. 81.

(iii.) **Ch. D.**—*Letters of—Stamp—Action for Amount not Covered by Stamp.*—The administratrix of X. brought an action to administer A.'s estate, claiming a considerable amount. The letters of administration were stamped for a nominal amount only. *Held*, that this was not a bar to the action.—*Jacobs* v. *Hind*, 60 L.T. 596.

(iv.) **Ch. D.**—*Advertisement for Creditors—Sufficiency—Lord St. Leonards' Act, s.* 29.—The executors of a Lancashire farmer advertised for creditors once in the *London Gazette*, once in each of two Lancashire weekly papers, and once in a Lancashire bi-weekly paper. *Held*, that such advertisements were sufficient.—*Doughty* v. *Townson*, 60 L.T. 628.

(i.) **Ch. D.**—*Testator's Business—Formation of Company—Jurisdiction.*—A testator engaged in business gave legacies by his will, and bequeathed his residuary estate to trustees, whom he authorised to carry on his business as long as they should think fit. The trustees carried on the business for some time, and, an action having been commenced for administration, applied for the sanction of the Court to a scheme for forming a company to take over the business, the company to consist in the first place of the persons interested under the will, to whom it was proposed to allot shares and debentures in lieu of their several interests in the testator's estate. It was stated that the testator's share in the business could not be realised without great loss, and that if realised at once there would not be enough to pay the legacies. *Held*, that the Court had no jurisdiction to sanction such a scheme.—*Dennis* v. *Crawshay*, 60 L.T. 357.

See Lunatic, p. 113, iv.

Arbitration:—

(ii.) **C. A.**—*Agreement to Employ for a Term—Arbitration Clause—Dismissal—Action to Restrain—Common Law Procedure Act*, 1854, *s.* 11.—A. agreed to employ B. as his agent for a term of years, and the agreement contained a clause providing for the reference of all differences to arbitration. A. dismissed B., and gave notice for an arbitration, and appointed an arbitrator. B. also appointed an arbitrator, but commenced an action to restrain A. from dismissing him. *Held*, on motion by A. to stay proceedings, that as A. had taken on himself to dismiss B., the Court ought not to stay proceedings.—*Davis* v. *Starr*, L.R. 41 Ch. D. 242; 37 W.R. 481.

See Solicitor, p. 129, i.

Banker.—*See* Practice, p. 122, ii.

Bankruptcy:—

(iii.) **C. A.**—*Bankruptcy Discharge and Closure Act*, 1887, *s.* 2, *sub-s.* 3—*Misdemeanour.*—A misdemeanour committed by the debtor which makes it necessary for the Court to refuse his discharge is a misdemeanour connected with or arising out of the bankruptcy in question.—*In re Brocklebank*, 37 W.R. 537.

(iv.) **C. A.**—*Deed of Arrangement—Registration—Alteration—Deed of Arrangement Act*, 1887, *ss.* 5, 6.—Decision of Q. B. D. (*see* Vol. **14**, p. 64, i.) reversed.—*E. p. Milne; in re Batten*, L.R. 22 Q.B.D. 685; 58 L.J. Q.B. 333; 37 W.R. 499.

(v.) **Q. B. D.**—*Disclaimer of Lease—Application for Vesting Order—Lessor—Time to Serve Notice of Motion—Evidence.*—A lessor may, as soon as he is served with notice of the trustee's application for leave to disclaim a lease, serve notice of motion for a vesting order on the parties interested; but in such a case he will run the risk of having his motion dismissed with costs, if the trustee's application is refused, or if he appears not to be entitled to a vesting order. — *In re Britton*, 37 W.R. 621.

(vi.) **C. A.** — *Discovery of Bankrupt's Property — Summons to Person to Attend—Illness—Examination at Residence.*—Where a person has been summoned to attend the Court, and give information as to a bankrupt's property, and it is shewn that he is unable through illness to attend, there is jurisdiction to order his examination at his residence.—*E. p. Hawkins; in re Bradbrook*, 37 W.R. 700.

(i.) **Q. B. D.**—*Payment to Revive Debt Barred by Statute—Fraudulent Preference—Bankruptcy Act*, 1883, *s.* 48.—A debtor, shortly before a receiving order was made, paid a relation a small sum to whom he was indebted, for the purpose of acknowledging and reviving the debt, which was statute-barred. *Held*, that such payment was not a fraudulent preference, and that the relative might prove in respect of the debt.—*E. p. Gaze; in re Lane*, L.R. 23 Q.B.D. 74; 37 W.R. 671.

(ii.) **C. A.**—*Rescission of Receiving Order—Consent of Creditors—Bankruptcy Act*, 1883, *ss.* 18, 23, 35, 104.—The Court has jurisdiction to rescind a receiving order, but will not as a matter of course do so because all the creditors consent. The Court will be guided by the provisions of the statute as to annulment of a bankruptcy.—*In re Hester; e. p. Hester*, L.R. 22 Q.B.D. 632.

(iii.) **Q. B. D.**—*Secured Creditor—Receiver—Order and Disposition—Bankruptcy Act*, 1888, *ss.* 44, 45, 49.—T. purchased a business from K. The purchase-money being in arrear, judgment was signed by K., and an order was made restraining K. from issuing execution without leave, and appointing X. receiver and manager of the business in conjunction with T., who was to deliver up possession of the business. No notice was given to T.'s debtors. X. was subsequently appointed sole receiver and manager. In December, 1886, an order was made by consent, transferring to K. certain book debts in satisfaction of his judgment, of which debts X. was to continue receiver. T. committed an act of bankruptcy in February, 1887, and a petition was presented. In April, K., being ignorant of the act of bankruptcy and of the petition, gave notice to some of the debtors of the assignment of December. T. was adjudicated bankrupt. *Held*, that K. was not a secured creditor; that the book debts were in the order and disposition of T., except those taken out of it by the notice given in April, as to which the assignment was a "protected transaction."—*E. p. Kingscote; in re Tillett*, 60 L.T. 575.

(iv.) **C. A.**—*Service out of Jurisdiction—Bankruptcy Act*, 1883, *s.* 127—*Bankruptcy Rules*, 1886, *rr.* 141, 156, 179, 184-186.—There is no power to allow service out of the jurisdiction of a receiving order or an order that the bankrupt do attend for his public examination.—*E. p. Official Receiver; in re Wendt*, L.R. 22 Q.B.D. 733.

(v.) **Q. B. D.**—*Solicitor's Charges—Small Bankruptcy—Bankruptcy Rules*, 1886, *r.* 112, *sub-ss.* 1, 2—*Appendix (Scale of Costs) Parts I. and II.*—The provision in the Bankruptcy Rules which reduce solicitor's charges in small bankruptcies where such charges are payable out of the estate, do not apply to conveyancing business, the charges in respect of which are governed by the General Regulations in the Appendix.—*In re Parfitt*, L.R. 23 Q.B.D. 40.

(vi.) **Q. B. D.**—*Solicitor's Costs in Action—Lien for.*—Where a receiver has been properly appointed in a partnership action, and a receiving order is subsequently made against the parties, the Court will give the plaintiff's solicitor a charge on the funds collected by the receiver. But such charge will not be given where the solicitor has instituted the proceedings and obtained the appointment of the receiver for the purpose of making costs, being aware of the insolvency of the firm.—*E. p. Lovett; in re Nicholas and Paine*, 37 W.R. 715.

Bill of Exchange :—

(vii.) **C. A.**—*Banker—Negligence—Forgery—"Fictitious or Non-Existent" Payee—Bills of Exchange Act*, 1882, *s.* 7, *sub-s.* 3.—Decision of Q. B. D. (*see* Vol. 14, p. 30, i.) affirmed.—*Vagliano* v. *Bank of England*, 58 L.J. Q.B. 357; 37 W.R. 640.

(i.) **C. A.**—*Notice of Dishonour—Inability to find Drawer—Bills of Exchange Act*, 1882, *s.* 48; *s.* 49, *sub-s.* 12; *s.* 50, *sub-ss.* 1, 2 (*a*) (*b*).—Failure by the holder of a bill of exchange, after the exercise of reasonable diligence at the time the bill is dishonoured, to find the drawer at the address he has given, for the purpose of giving him notice of dishonour, does not dispense with such notice if an address at which the drawer is to be found comes to the knowledge of the holder before action brought.—*Studdy* v. *Beesty*, 60 L.T. 647.

Bill of Sale:—

(ii.) **Q. B. D.**—*Mortgage of Building Lease—Building Materials.*—A lessee of a building lease assigned by way of mortgage the premises and all building materials which might be thereon. There was a proviso that all such materials should, when brought upon the premises, be considered as forming part of the fee simple thereof; and there was a power for the mortgagee in certain cases to enter and seize the materials and complete the building, and also to enter and sell the premises and any materials thereon either together or in parcels. *Held*, that as the deed gave power to sell the building materials apart from the premises, it was a bill of sale.—*Climpson* v. *Coles*, 58 L.J. Q.B. 346.

(iii.) **Q. B. D.**—*Validity—Power to Seize—Covenant "Necessary for Maintenance of Security"—Bills of Sale Act*, 1882, *s.* 7.—Covenants not to remove goods, or suffer them to be removed, or "do or suffer any act whereby they may be prejudicially affected"; not to suffer a distress; and not to do anything whereby the grantor might become a bankrupt, are covenants "necessary for maintaining the security." A bill of sale contained several covenants by the grantor, and a proviso that the goods "shall be held and possessed without any let or hindrance from the grantee until the same shall be taken possession of by the grantee in consequence of the breach of any of the covenants, and that the same shall not be liable to seizure, or be taken possession of by the grantee for any other cause than those specified in section 7 of the Bills of Sale Act, 1882." *Held*, that the proviso did not authorise a seizure for matters other than those contained in section 7.—*E. p. Pope; in re Paxton*, 60 L.T. 428.

Charity:—

(iv.) **Ch. D.**—*City of London Parochial Charities Act*, 1883—*Vested Interest.*—The trustees of a city charity, which was regulated by a scheme sanctioned in 1883, passed a resolution that A. be appointed clerk and solicitor at a yearly salary payable quarterly. *Held*, that no freehold office was thereby created, and that A. had not a vested interest in the charity property.—*In re St. Edmund the King and Martyr*, 60 L.T. 622.

(v.) **Ch. D.**—*City of London Parochial Charities Act*, 1883—*Churchyard—Claim of Rector to Freehold.*—By an Act of Charles II. the site of a church was vested in the Corporation of London. Since the Great Fire the site was treated by the rector and churchwardens as impressed with a trust for the benefit of the parish. *Held*, that it must be assumed that the Corporation had conveyed the site to the rector and churchwardens, and that it was charitable property and not the property of the rector.—*In re St. Nicholas Acons*, 60 L.T. 532.

(vi.) **Ch. D.**—*Mortmain—Interest in Land—Bridge Tolls—Mortgage of.*—Harbour trustees had power to charge rates on vessels entering or leaving the harbour, and on goods loaded and discharged there, and to levy tolls for passage over a bridge. They borrowed money on security of bonds

by which they assigned the "rates, tolls, rents, and other moneys" arising by virtue of the Act by which their powers were given. *Held*, that the rates on vessels and goods did not savour of the realty, but that the bridge tolls savoured of the realty, and that the bonds could not be bequeathed to a charity.—*Buckley* v. *Royal Life-Boat Institution*, L.R. 41 Ch. D. 168; 60 L.T. 786; 37 W.R. 613.

Cheque:—

(i.) **Q. B. D.**—*Post-dated Cheque—Stamp—Stamp Act*, 1870, *ss.* 17, 54—*Bills of Exchange Act*, 1882, *s.* 29.—A post-dated cheque bearing a penny stamp is a valid and negotiable instrument, and is "complete and regular upon the face of it."—*Hitchcock* v. *Edwards*, 60 L.T. 636.

Colonial Law:—

(ii.) **P. C.—Canada.**—*Crown Prerogative—Royalties—Public Lands.*—The Province of British Columbia conveyed to the Dominion Government "public lands" for the construction of a railway. *Held*, that the rights of the Provincial Government to royalties connected with mines and minerals under such lands did not pass to the Dominion Government.—*A.-G. of British Columbia* v. *A.-G. of Canada*, 60 L.T. 712.

(iii.) **P. C.—New South Wales.**—*Pastoral Lease.*—The rent of a pastoral lease of a leasehold area, granted under the Crown Lands Act, 1884, is to be computed from the date of the notification in the *Gazette*, without regard to the date of determination of leases of the same land held before and at the time of the Act coming into force.—*Reid* v. *Garrett*, L.R. 14, App. Cas. 94; 60 L.T. 339.

Company:—

(iv.) **Ch. D.**—*Debenture—Charge on Undertaking—Public Purpose—Conveyancing Act*, 1881, *s.* 19.—The statutory powers of mortgagees do not apply to the holders of the debentures of a company. A water works company, incorporated under a Provisional Order, and having power to charge the undertaking, issued debentures charging the property and effects of the company, with a proviso that the charge was not to hinder any dealings in the course of the company's business. *Held*, that the undertaking being a public one, the debenture-holders were not entitled to judgment for a sale, nor to the appointment of a manager.—*Baker* v. *Herts and Essex Waterworks Co.*, L.R. 41 Ch. D. 399; 58 L.J. Ch. 497; 60 L.T. 776; 37 W.R. 601.

(v.) **C. A.**—*Director—Qualification—Holding Shares "in his own Right"—Power of Removal.*—A provision in the articles of association that X. shall be managing director cannot be specifically enforced, therefore the Court will not force X. on the company against the wishes of the shareholders, and when an extraordinary general meeting has passed a resolution against his so acting, an interlocutory injunction restraining the other directors from preventing him from so acting will not be granted. *Quære*, whether the expression "holding shares as a registered member in his own right," in the director's qualification clause, means that he must be the beneficial owner of the shares, or only that he must not be unregistered or registered as holding in some-one else's right.—*Bainbridge* v. *Smith*, 37 W.R. 594.

(vi.) **Ch. D.**—*Directors—Quorum—Allotment of Shares—Irregular.*—A company's articles provided that the directors should not be less than three, and that the directors might determine what should be the quorum. Four directors were appointed. At the first meeting two were present

who resolved that two should form a quorum, and allotted shares, including an allotment to S. He next day withdrew his application. The two absent directors afterwards expressed in writing their approval of the resolution fixing the quorum. *Held*, that the allotment was bad, as the resolution fixing the quorum was invalid.—*In re Portuguese Consolidated Copper Mines*, 58 L.J. Ch. 491.

(i.) **H. L.**—*Distribution of Assets—Partly Paid-up Shares.*—Decision of C. A. (*see* Vol. 13, p. 5, iii.) affirmed on the words of the special Act without deciding any general question of law.—*Sheppard* v. *Scinde, &c., Ry.*, 60 L.T. 641.

(ii.) **C. A.**—*Prospectus—Misrepresentation—Error Corrected by Circular.*—Directors of a company invited applications for debenture stock by a prospectus which stated that £200,000 share capital had been subscribed, whereas it had, in fact, only been allotted in fully paid-up shares to a contractor. After allotment, the directors sent the allottees a circular stating the truth about such share capital, but not informing them that they could retire and get back the money they had paid. After the company had proved a failure, *held*, in an action by the allottees against the directors, that they were entitled to damages for the misrepresentation, in respect of the instalments paid by them after receipt of the circular, as well as in respect of the money paid before such receipt. *Quære*, how the case would have stood if the circular had admitted the misrepresentation in the prospectus, and informed the allottees that they could have their money back.—*Arnison* v. *Smith*, L.R. 41 Ch. D. 348.

(iii.) **Ch. D.**—*Rent—When Due—Apportionment Act*, 1870, *ss.* 2, 3—*Creditor—Companies Act*, 1862, *ss.* 82, 158.—Although rent is, under the Apportionment Act, to be considered as accruing from day to day, the date at which it becomes due is not altered by such Act, and consequently a landlord is not entitled to petition for the winding-up of a company, his tenant, as a creditor in respect of the apportioned part of the rent of premises from the last quarter-day to the day of presenting the petition.—*In re United Club and Hotel Co.*, 60 L.T. 665.

(iv.) **Ch. D.**—*Reduction of Capital—Shares in Company Purchased out of Profits.*—The A. company had purchased some of its own shares out of profits. The capital of the company was in excess of its wants. *Held*, that the proper resolutions having been passed, and all the debts of the company duly provided for, the capital might be reduced by extinguishing the shares so purchased.—*E.p. Robinson ; in re York Glass Co.*, 60 L.T. 744.

(v.) **Ch. D.**—*Payment of Shares in Cash—Set-off of Debt against Calls—Companies Act*, 1867, *s.* 25.—An agreement by a shareholder in a company with the company to set off against future calls on his shares a present liability of the company to pay cash to him, is payment of the calls in cash.—*In re Jones, Lloyd & Co.*, L.R. 41 Ch. D. 159 ; 37 W.R. 615.

(vi.) **C. A.**—*Shares—Calls—Essentials—Obligation to Register Transfer.*—It is essential to the making of a call on shares that the time and place of payment should be fixed. The articles provided (1) that calls should be deemed to be made when the resolutions authorising them were passed; (2) that the board might fix a new time and place for payment as regards persons who had not paid a call; (3) that twenty-one days' notice of a call must be given ; (4) that transfers of shares by persons indebted to the company need not be registered. H., a director, transferred shares to avoid a liability for probable calls,

The transfer was lodged for registration in the morning of December 18. Later on the same day the board, to avoid registering the transfer, resolved to call up the rest of the capital, without fixing a time for payment, and then refused to register the transfer on the ground of H.'s indebtedness. *Held* (1) that there was no valid call; (2) that even if there were, H. was not indebted in respect of it at the time of delivery of the transfer; (3) that he was entitled to have the transfer registered.—*E. p. Hallett; in re Cawley & Co.*, 37 W.R. 692.

(i.) **C. A.**—*Shares—Issue—Discount—Underwriting Agreement.*—Shortly after the formation of a company A. agreed with an agent of the company to "underwrite" 10,000 shares at "fifteen per cent. discount," and to pay the application money on any balance of shares required to make up the 10,000. The company allotted to A. 8,500 shares, which he refused to accept. *Held*, in the winding up, that the agreement was an agreement to take the balance of shares not subscribed for by the public, and that the company was authorised to allot the shares to A. *Held*, also, that "discount" meant "commission" to be paid on the total number of shares "underwritten," that the agreement was not to issue shares at a discount, and that A. was properly settled on the list of contributories.—*E. p. Audain; in re Licensed Victuallers' Mutual Trading Association*, 58 L.J. Ch. 467; 60 L.T. 685; 37 W.R. 674.

(ii.) **Ch. D.**—*Shares—Issue at a Discount.*—A new company was formed for the purpose of taking over the business of an old company. Certain shareholders of the old company, having refused a previous option of taking shares in the new company, agreed to take shares of 30 shillings each in the new company, credited with 26 shillings paid-up, in consideration of 11 shillings per share. There was no contract registered. *Held*, that the issue was at a discount and illegal, and that one of such shareholders was entitled to be removed from the register.—*E. p. Higgins; in re Zoedone Co.*, 60 L.T. 383.

(iii.) **C. A.**—*Shares Issued—Discount—Rectification of Register.—Repayment.*—Decision of Ch. D. (*see* Vol. **14**, p. 70, i.) reversed.—*In re Railways Time Tables Publishing Co.*, 58 L.J. Ch. 504; 37 W.R. 531.

(iv.) **Ch. D.**—*Tramways—Inquiry as to Promoters—Injunction to Restrain—Tramways Act, 1870, ss. 4, 42, 44—Companies Act, 1862, s. 87.*—A tramway company being in liquidation, the Board of Trade ordered an inquiry to ascertain the solvency of the promoters. *Held*, that such inquiry was not a proceeding against the company, and could not be restrained.—*In re Pontypridd & Rhondda Valley Tramways Co.*, 37 W.R. 570.

(v.) **Ch. D.**—*Winding-up Petition—Objects Impossible.*—A company was formed to acquire and work gold mining properties, and in particular a certain specified property. It afterwards became doubtful whether such property existed. A shareholder petitioned for a compulsory winding-up, which was opposed by the great majority of the shareholders. *Held*, that the order ought not to be made.—*In re The Nylstroom Company*, 60 L.T. 477.

(vi.) **Ch. D.**—*Winding-up—Rates—Priority.*—In a case not within the Preferential Payments in Bankruptcy Act, 1888, a parish rate becoming due and payable in respect of a company's premises before the commencement of the winding-up of the company, is not payable in priority to other debts.—*In re Art Engraving Co.*, 60 L.T. 381.

See Mortgage, p. 115, iv.

Conflict of Laws:—

(i.) **C. A.**—*Lex Loci Contractus—Lex Fori—Law of the Flag—Ship—Intention of Parties.*—An English shipowning company made a contract in America, through an American agent, with an American citizen, to convey cattle in an English ship, to an English port, subject to a stipulation, valid by English, but void by American law, limiting their liability. The bills of lading, which were in English form, were made out in conformity with the contract. *Held*, that, having regard to all the circumstances, it must be inferred that the parties intended the contract to be governed by English law, and that the stipulation was therefore valid.—*In re Missouri Steamship Co.*, 37 W.R. 696.

Contempt of Court:—

(ii.) **Ch. D.**—*Publication in Newspaper—Pending Action—Ignorance.*—The liquidator of a company brought an action against X., a promoter. Previously to issuing the writ he sent to the shareholders a "private and confidential" circular stating his proposed action, and that he was advised by counsel that there were good grounds for holding X. liable. The circular was published in a newspaper after the issue of the writ, the managers of the newspaper being ignorant of such issue. *Held*, that there was nothing in the publication to prejudice X. in the litigation, and that the doctrine of contempt of court did not require the managers of the newspaper to take cognizance of what was passing in Her Majesty's Courts.—*Metropolitan Music Hall Co.* v. *Lake*, 60 L.T. 749.

Contract:—

(iii.) **Ch. D.**—*Statute of Frauds, s. 4—Name of Party to Agreement—Signature.*—An agreement to take a lease in the body of which the tenant's name is not mentioned, but which is signed by him, is sufficient to satisfy the statute.—*Stokell* v. *Niven*, 60 L.T. 382.

See Insurance, p. 110, i.

Copyholds:—

(iv.) **C. A.**—*Enfranchisement—Valuation—Review—Imperfect or Erroneous—Copyhold Act*, 1887, *s.* 11.—Decision of Q.B.D. (*see* Vol. **14**, p. 71, v.) reversed.—*Reg.* v. *Land Commissioners for England*, L.R. 23 Q.B.D. 59; 58 L.J. Q.B. 318; 37 W.R. 538.

Costs:—

(v.) **Ch. D.**—*Taxation—Counsel—Evidence.*—In fixing the remuneration of counsel and solicitors, and the number of counsel to be employed, the amount of the money issue involved, and the commercial importance of the case are properly taken into consideration. The amount of evidence used in Court is not the limit of the evidence the costs of which will be allowed on taxation.—*L.C. & D.R.* v. *S.E.R.*, 60 L.T. 753.

(vi.) **Ch. D.**—*Taxation—Counsel's Fees—Refreshers—R.S.C.*, 1883, *O.* lxv., *r.* 27, *sub-r.* 48.—The taxing master, in calculating the five hours referred to in the rule, is not to deduct the time occupied by the mid-day adjournment.—*Collins* v. *Worley*, 60 L.T. 748.

See Mortgage, p. 115, iii.

Criminal Law:—

(vii.) **C. C. R.**—*Bigamy—Belief in Death of Husband or Wife—24 & 25 Vict., c.* 100, *s.* 57.—A belief in good faith and on reasonable grounds in the death of a husband or wife is a good defence against a charge of bigamy.—*Reg.* v. *Tolson*, 58 L.J. M.C. 97; 37 W.R. 716.

(i.) **Q. B. D.**—*Cruelty to Animals—Dishorning Cattle.*—The operation of dishorning cattle is illegal.—*Ford* v. *Wiley*, 37 W.R. 709.

(ii.) **C. C. R.**—*False Pretences—Promissory Note Obtained by—24 & 25 Vict., c. 96, s. 90.*—The prisoner, a money lender, stated to the prosecutor that he was prepared to lend £100 at 5 per cent. interest, and that it was not his practice to stop the interest out of the money advanced, but that the whole £100 would be paid down. The prosecutor signed a promissory note for £100, in exchange for which the prisoner gave only £60, saying that the other £40 was his charge for the advance. *Held*, that the prisoner could be convicted of inducing the prosecutor to make a valuable security by falsely pretending that he was prepared to advance £100.—*Reg.* v. *Gordon*, 58 L.J. M.C. 117.

(iii.) **C. C. R.**—*Court "before whom he is Brought"—Committal at Petty Sessions—Trial at Quarter Sessions—Amendment of Indictment—Prevention of Crime Act*, 1871, *s.* 7, *sub-s.* (3).—Prisoner was charged before petty sessions with being found under such circumstances as to satisfy the Court before whom he was brought that he was about to commit an offence, being a person twice convicted with crime. At his demand he was sent to Quarter Sessions for trial by a jury. *Held*, that the Quarter Sessions was the Court before whom he was brought, and that he could be convicted there. *Held*, also, that an indictment which charged the committal to have been before one justice, when it was before two, was rightly amended in accordance with the fact.—*Reg.* v. *Willcox*, 37 W.R. 686.

Domicile:—

(iv.) **Ch. D.**—*Intestacy—Leaseholds—Lex Loci.*—A domiciled Scotchman died possessed of leaseholds in England and intestate as to them. *Held*, that they devolved, according to the *lex loci*, on his next-of-kin according to the English Statute of Distributions.—*In re Duncan and Lawson*, L.R. 41 Ch. D. 394; 58 L.J. Ch. 502; 60 L.T. 732; 37 W.R. 524.

Easement:—

(v.) **Ch. D.**—*Light—Chapel.*—A building which had been used since 1835 as a chapel was in 1875 decorated with mural mosaics. *Held*, that the defendants could be restrained from erecting buildings of such height as sensibly to diminish the light available for religious services and for viewing the mosaics in the chapel.—*A. G.* v. *Queen Anne's and Garden Mansion Co.*, 60 L.T. 759; 37 W.R. 572.

(vi.) **Ch. D.**—*Wall—Support—Statute of Limitations.*—Fifty years before action brought, A. built a wall on the top of a wall belonging to B., and used it to support the roof of his house. *Held*, that the wall so built became B.'s property, and that A. did not acquire a title to the wall, but only a right to support; therefore, an action brought by A. to restrain B. from dealing with the wall in a manner which did not interfere with the right of support was dismissed.—*Waddington* v. *Naylor*, 60 L.T. 480.

Ecclesiastical Law:—

(vii.) **Ch. D.**—*Churchyard—Way Within—Removal of Steps—Ecclesiastical Court.*—The incumbent and churchwardens removed, without a faculty, certain steps which led from a high road up to a path in the churchyard. Parishioners brought an action for a mandatory injunction to compel them to restore the steps. *Held*, that it was a case for the Ecclesiastical Court, and that the Court ought to decline to exercise jurisdiction.—*Batten* v. *Gedge*, 37 W.R. 540.

(i.) **C. A.**—*Pew—Ownership—Right Appurtenant to House—Presumption of Legal Origin.*—Where the successive owners of a house have had a long-continued enjoyment of a pew in a parish church, and have done acts with regard to it inconsistent with mere possession by permission of the churchwardens, the grant of a faculty at some time should be presumed, although there is no evidence of such grant and although there is evidence that the pew was originally acquired under circumstances that would not confer a legal right.—*Halliday* v. *Phillips*, L.R. 23 Q.B.D. 48.

Election:—

(ii.) **Q. B. D.**—*Bribery—Order for Prosecution—Municipal Elections (Corrupt and Illegal Practices) Act*, 1884, *ss.* 23, 28, 30.—At the trial of a municipal election petition, evidence was given shewing that G. had been guilty of bribery, and a notice was served on him to attend and shew cause why he should not be reported. He failed to attend, and the commissioner ordered that he should be indicted at the assizes, and that a summons should be issued requiring him to attend before justices to be committed for trial. *Held*, that the orders were regular, there being no necessity for the evidence to be taken *de novo* for the purposes of the prosecution.—*Reg.* v. *Shellard*, 37 W.R. 706.

(iii.) **Q. B. D.**—*Municipal Election Petition—Right of Audience of Counsel—Municipal Elections (Corrupt and Illegal Practices) Act*, 1884, *s.* 23, *Sched.* 3, *part* 2—*Corrupt and Illegal Practices Prevention Act*, 1883, *s.* 38.—A commissioner appointed to hear a municipal election petition has no power to hear a counsel or a solicitor on behalf of a person charged with corrupt practices, and entitled to be heard " by himself."—*Reg.* v. *Mansel Jones*, L.R. 23 Q.B.D. 29; 37 W.R. 508.

Evidence:—

(iv.) **C. A.**—*Foreign Law.*—Foreign law is a matter of fact to be determined on the evidence of advocates practising in the Courts of the country whose law is to be ascertained, but if the witnesses in their evidence refer to any passages in the code of their country, as containing the law applicable to the case, the Court may look at those passages and consider what is their proper meaning. — *Concha* v. *Murrieta; De Mora* v. *Concha*, L.R. 40 Ch. D. 543.

Executor:—

(v.) **C. A.**—*Right of Action Against—Tort—Quasi-contract.*—By the law of Peru a father is entitled to administer the estate of his infant child, and to receive the income for his own benefit. A father during the infancy of his daughter sold improperly part of her estate at an undervalue. *Held*, that the father being in a fiduciary position, his act in making the improper sale was a breach of a quasi-contract, and that there was a right of action against his estate for the loss occasioned.—*Concha* v. *Murrieta; De Mora* v. *Concha*, L.R. 40 Ch. D. 543.

Game:—

(vi.) **Q. B. D.**—*Dealer—Foreign Game—Game Act*, 1831, *ss.* 2, 3, 4.—A licensed dealer in game, who has foreign game in his shop more than ten days after the commencement of the English close season for such description of game, does not commit an offence against the Game Act. —*Guyer* v. *The Queen*, L.R. 23 Q.B.D. 100; 58 L.J. M.C. 81; 37 W.R. 586.

Goodwill:—

(i.) **Ch. D.**—*Sale of—Benefit of Agreement with Servant—Waiver—Practice—R.S.C.*, 1883, *O.* xvi., *rr.* 2, 11.—The plaintiffs employed the defendant as a traveller, under an agreement restraining him from being employed in the sale of certain goods for a limited time. The plaintiffs sold the goodwill of their business to a company, and the defendant entered the company's service, and on leaving it took employment contrary to his agreement. In an action to restrain him, *held*, that the benefit of the agreement passed to the company with the goodwill, that the plaintiff's consent to the defendant's entering the company's service was not a release of the agreement, and that the company might be added as co-plaintiffs without putting the plaintiffs on terms as to costs.—*Showell* v. *Winkup*, 60 L.T. 389.

Highway:—

(ii.) **Q. B. D.**—*Highways and Locomotives (Amendment) Act*, 1878, *s.* 32—*Agricultural Purposes.*—The fact that a locomotive has been let out to hire to draw manure from a wharf to a farm, does not disentitle it to exemption from the necessity of being licensed as being used "solely for agricultural purposes."—*Ellis* v. *Hulse*, L.R. 23 Q.B.D. 24; 58 L.J. M.C. 91; *Jesse* v. *Hales*, 37 W.R. 557.

Husband and Wife:—

(iii.) **P. D.**—*Divorce—Bigamy—Proof of Co-habitation—Matrimonial Causes Act*, 1856, *s.* 27—*Affidavit.*—Co-habitation as well as the performance of a marriage ceremony must be proved to establish "bigamy with adultery." In a very special case the co-habitation was allowed to be proved by affidavit.—*Ellam* v. *Ellam*, 58 L.J. P. 56.

(iv.) **P. D.**—*Divorce—Cross-Petitions—Both Parties Guilty.*—In cross-petitions for divorce by husband and wife the jury found that the wife had committed adultery, and that the husband had committed adultery with the wife's sister and another woman, and that the wife had condoned his adultery. *Held*, that no decree ought to be made.—*Stoker* v. *Stoker*, L.R. 14 P.D. 60; 58 L.J. P. 40; 60 L.T. 400; 37 W.R. 576.

(v.) **P. D.**—*Divorce—Intervention of Queen's Proctor—Adultery procured by Agent of Petitioner.*—A wife, living apart from her husband, employed a solicitor to watch him. The solicitor's clerk, without the authority of, and unknown to, the wife, induced the husband to commit adultery, and the wife obtained a decree *nisi* for adultery and cruelty. On the intervention of the Queen's proctor, *held*, that the decree *nisi* must be rescinded, but that as the intervention did not touch the charge of cruelty, the petition should not be dismissed, in order that the wife might apply for a judicial separation.—*Bell* v. *Bell*, 58 L.J. P. 54.

Infant:—

(vi.) **Ch. D.**—*Bequest of Residue—Executor—Maintenance—Conveyancing Act*, 1881, *s.* 43.—Where a residue of personalty is bequeathed to an infant, the executor is a trustee of such residue as soon as it is ascertained, and may apply the income in the maintenance of the infant.—*Henderson-Roe* v. *Hitchins*, 37 W.R. 705.

(vii.) **Ch. D.**—*Contract—Ratification—Action ex Delicto—Infants' Relief Act*, 1874, *ss.* 1, 2.—A., an infant, received and misappropriated moneys belonging to X., his master. Shortly before A. came of age the misappropriations were discovered and their amount ascertained. On his coming of age, being then entitled to a sum of money under a will,

he signed a memorandum acknowledging that he owed X. the amount ascertained, promising to pay the same, and charging the sum due to him therewith. *Held*, that the memorandum was not a ratification of a contract made during infancy, but that, as A. was liable to an action *ex delicto* there was good consideration for the charge. -*Seeley* v. *Briggs*, 60 L.T. 665.

Insurance :—

(i.) **P. C.**—*Contract for—Open Cover—Offer—Acceptance.*—A. gave to M., a shipowner, an open cover or proposal to insure goods to be shipped on a certain vessel, in order that he might give it to an intending charterer of the vessel. The charterer after shipment applied for two policies to the amount of the cover and was refused. *Held*, that there was a contract binding on A. to issue a policy to the amount of the cover. *Held*, also, that the fact of the charterer asking for two policies instead of one, did not prevent the acceptance of the offer contained in the open cover being sufficient, as A. refused to issue any policy.—*Bhugwandass* v. *The Netherlands Insurance Company of Batavia*, L.R. 14 App. Cas. 83.

(ii.) **P. C.**—*Condition for Determining Policy—Ejusdem Generis.*—A policy of fire insurance was made subject to the condition that if anything were done to the property insured to increase the risk, or if the property were removed without the consent of the insurers, the policy should determine; and to the further condition that, "If by reason of such change, or from any other cause whatsoever, the society should desire to terminate the insurance, it should be lawful for the society to do so," repaying a proportionate part of the premium. *Held*, that the doctrine of *ejusdem generis* did not apply, and that the condition included any cause which could reasonably induce the insurers to wish to terminate the policy, and that the insurers were the only judges of the sufficiency of the reasons for terminating it.—*Sun Fire Office* v. *Hart*, L.R. 14 App. Cas. 98; 58 L.J. P.C. 69; 60 L.T. 337; 37 W.R. 56.

Joint Tenancy :—

(iii.) **Ch. D.**—*Investment in Joint Names—Limitations—Declaration of Trust.*—Two sisters, living together, and apparently intending to live always together, having a common source of income, made each, from time to time, investments in their joint names, on which they received the dividends for their common use. *Held*, that the proper inference was that a joint tenancy was intended. A., one of the sisters, appointed B., the other sister, her executrix, and bequeathed her residue to J., her nephew. B. (thinking that there was an intestacy as to the residue) passed the residuary account showing a sum in hand as being "the said residue which I intend to retain to my own use and for the use of J., being a sister and a descendant of a brother of the deceased." *Held*, that this was not such a declaration of trust as would prevent the statute of limitations from running against J.—*Jacobs* v. *Hind*, 60 L.T. 596.

Justices.—*See* Practice, p. 121, vii. Licensing, p. 112, i.

Landlord and Tenant :—

(iv.) **H. L.**—*Contract for Lease—Representations—Restrictive Covenants.*—S. purchased the fee of several houses forming one block, the conveyances containing a covenant against allowing the use of any of the houses for the purpose of trade. S. granted to M. a lease of one of the houses, which lease contained a similar restrictive covenant. During the negotiations statements were made by S.'s solicitors to M.,

by which he became aware that the said conveyances and all the leases of the said houses granted by S. contained similar restrictive covenants. *Held*, that such statements did not amount to a collateral contract by S. as to the future management of the estate, but that from the nature of the transaction M. was entitled to restrain S. from allowing any of the houses to be used for the purpose of trade.—(*See* Vol. 12, p. 33, vi.).—*Spicer* v. *Martin*, L.R. 14 App. Cas. 12; 58 L.J. Ch. 309; 60 L.T. 546; 37 W.R. 689.

(i.) C. A.—*Covenant for Quiet Enjoyment.—Trade Purposes.—Nuisance.*—The covenant for quiet enjoyment is broken if the lessor does any act whereby the demised premises are made unfit for the purposes for which they were let. Where premises are let for the purpose of storing paper the lessor does not commit a breach of the covenant by an act which renders the premises unfit for storing a particular kind of paper, but not for storing paper generally. A person carrying on a delicate and sensitive trade has no right to complain, on the ground of nuisance, if an occupier of adjacent premises, in carrying on his own trade in a proper manner, does acts, which are detrimental to his delicate and sensitive trade, though not noxious to any other trade.—*Robinson* v. *Kilvert*, L.R. 41 Ch. D. 88; 58 L.J. Ch. 392; 37 W.R. 545.

(ii.) Q. B. D.—*Covenant Running with Land—Public House—Forfeiture of License.*—A covenant by the lessee of a public house to afford no ground whereby the licence might be suspended or forfeited or be in any danger of being suspended or forfeited, runs with the land, and may be enforced by an assignee of the reversion, but is not broken if a person who occupies the house by leave of the lessee is convicted of selling drink within prohibited hours, the licence not being endorsed.—*Fleetwood* v. *Hull*, L.R. 23 Q.B.D. 35; 58 L.J. Q.B. 341; 60 L.T. 791; 37 W.R. 714.

(iii.) C. A.—*Lessor's Title—Mistake—Compensation.*—A., a leaseholder, believing that his term had thirty years to run, agreed in writing with X. to grant him a lease for twenty-one years, there being no provision for compensation for misdescription. X. took his underlease without investigating A.'s title. On its appearing that A.'s lease had only fourteen years to run, *held*, that X. was not entitled to compensation for misdescription.—*Clayton* v. *Leech*, L.R. 41 Ch.D. 103; 37 W.R. 663.

(iv.) Ch. D.—*Outgoings—Expenses of Paving.*—By an agreement for a lease of a house for three years the tenant agreed to pay "all sewers rate, tithe rentcharge, land tax (if any), and all existing and future taxes, rates, assessments, and outgoings of every description payable by landlord or tenant in respect of the premises during the tenancy (except the landlord's property tax)." *Held*, that the tenant must pay a sum assessed on the house for the expense of paving the road abutting on it.—*Batchelor* v. *Bigger*, 60 L.T. 416.

See Company, p. 104, iii. Specific Performance, p. 129, v.

Libel:-

(v.) H. L.—*Report of Judgment—Privilege.*—*Semble*, that the report of the judgment in an action, without the evidence, is not necessarily privileged, though published *bonâ fide* and without malice. But where such a report was sued on as a libel, and the Judge left it to the jury whether it was a fair, accurate, and honest report, published *bonâ fide* and without malice, and the jury gave a verdict for the defendant, *held*, that there was no misdirection.—*Macdougall* v. *Knight*, 60 L.T. 762.

Licensing:—

(i.) **Q. B. D.**—*Mandamus to Justices to hold Adjourned Meeting and Hear Application—Obedience to Mandamus—Jurisdiction to Refuse Application.*—Justices refused a renewal of a licence, no notice of opposition having been served on the applicant. They were ordered by mandamus to hold an adjourned meeting and hear and determine the application on its merits. At the adjourned meeting, notice of opposition having been served, the justices refused the application. *Held*, that they had jurisdiction to do so, and had obeyed the mandamus.—*Reg.* v. *Howard*, 37 W.R. 617.

(ii.) **Q. B. D.**—*Forfeited Licence—Transfer—Licensing Act*, 1874, *s.* 15.—Where a licence is forfeited for offences specified in section 15 of the Licensing Act, 1874, application for a transfer of the license must be made at the next special sessions subsequent to the grant of temporary authority to carry on the business. Where such application is refused, the licence must be treated as expired, and any application for a licence of the same premises must be for a new licence, and not by way of renewal.—*Stevens* v. *Bedfordshire Justices*, 37 W.R. 605.

Limitations:—

(iii.) **Ch. D.**—*Void Deed—Charitable Trust.*—A. granted land to trustees on charitable trusts. The deed was not enrolled, and A. died before the expiration of a year from its date. The trustees hold the land more than twelve years, and administered it according to the trusts. *Held*, that the deed was void and passed no estate; that the trustees were not trustees for the grantor and his heirs; and that they had acquired a good title under the statute.—*Churcher* v. *Martin*, 37 W.R. 682.

(iv.) **Ch. D.**—*Principal and Surety—Mortgage—Mercantile Law Amendment Act*, 1856, *s.* 14—*Real Property Limitation Act*, 1874, *s.* 8.—Where A., a mortgagor, and B., his surety, jointly covenanted for the payment of the mortgage debt and interest, the payment of interest by A. keeps the debt alive against B., and prevents the Statute running in his favour.—*Allison* v. *Frisby*, 37 W.R. 603.

See Joint Tenancy, p. 110, iii. Local Government, p. 112, vi.

Local Government:—

(v.) **Q. B. D.**—*Agreement by Corporation to pay Yearly Sum—Borough Fund—Surplus—Municipal Corporations Act*, 1882, *ss.* 139-143.—The corporation of a borough agreed to pay a yearly sum for a term to the owners of a bridge to free the bridge from tolls during the term. *Held*, that such payments could only be made out of the surplus of the borough fund when there was such a surplus; that the agreement did not pledge the corporation to an illegal appropriation of the fund, as no payment out of the fund could be ordered in any year unless there was such a surplus; and that the agreement was valid.—*Attorney-General* v. *Mayor of Newcastle*, 60 L.T. 791.

(vi.) **Q. B. D.**—*Expenses—Charge on Premises—Date of Charge—Limitations—Local Government Act*, 1858, *s.* 62.—Where a local board does work the expenses of which are a charge on premises, such charge takes effect on the completion of the work, and the local board, suing more than twelve years after such date for a declaration of charge, is barred by the Statute of Limitations.—*Hornsey Local Board* v. *Monarch Building Society*, 37 W.R. 556.

(i.) **Q. B. D.**—*Commission on Contract to Officer—Illegal Payment—Allowance—Discretion—Public Health Act*, 1875, *ss.* 189, 193.—A payment by a local authority to one of its officers of a commission on the amount of a contract for works is illegal, and the Court must grant a *certiorari* to bring up and quash resolutions passed by the authority for the payment of such commission. *Semble*, that the term "allowance" in sec. 189 of the Public Health Act, 1875, does not include an allowance of money.—*Reg.* v. *Mayor of Ramsgate*, L.R. 23 Q.B.D. 66; 58 L.J. Q.B. 352.

(ii.) **C. A.**—*Person Interested in Contract by Local Board—Public Health Act*, 1875, *Sched.* 2, *rr.* 64, 70.—A contractor, who had contracted with a local board to supply some apparatus, employed the defendant to do certain work necessary to the completion of the contract, and paid him for such work. *Held*, that the defendant was interested in the contract, and liable to a penalty.—*Nutton* v. *Wilson*, L.R. 22 Q.B.D. 744; 37 W.R. 522.

(iii.) **Q. B. D.**—*Weights and Measures—Police—Appointed Inspectors—Fees—Weights and Measures Act*, 1878, *s.* 47—51 *&* 52 *Vict.* *c.* ix.—The superintendents of police were appointed by quarter sessions to be inspectors of weights and measures. There was a local Act of 1888 which provided that all fees received by constables for any act performed in execution of their duty should go to the Police Superannuation Fund. *Held*, that notwithstanding such Act, the fees received for stamping weights and measures ought to go to the credit of the county rate.—*Reg.* v. *Justices of Kesteven*, 37 W.R. 670.

Lunatic:—

(iv.) **C. A.**—*Payment by Way of Bounty—Promissory Note—No Consideration.*—The holder of a promissory note given without consideration is not, like the holder of a voluntary bond, entitled to claim against the estate of the giver after payment of creditors for value. W., having become entitled under a will to a large fortune which the testator intended to bequeath to H., gave H. a promissory note for £50,000 by way of compensation. After payment of £15,000 on account W. become a lunatic. H., with the assent of the next-of-kin, applied for payment of the balance. *Held*, that such payment ought to be made. *Held*, also, that the application ought to have been made by the committee, and that he ought to be joined as co-petitioner.—*In re Whitaker*, 58 L.J. Ch. 487; 37 W.R. 673.

(v.) **C. A.**—*Sale of Land for Building—Lunacy Regulation Act*, 1853, *s.* 125.—The lunatic was seised in fee of a house. The house having been burnt down the committee contracted to sell the site to a person who intended to build on it. *Held*, that the contract could not be sanctioned.—*Re Tomkins*, 60 L.T. 402.

Malicious Prosecution:—

(vi.) **Q. B. D.**—*Search Warrant—Judicial Act.*—The act of a justice in issuing a search warrant under the Criminal Law Amendment Act, 1885, sec. 10, is a judicial act, and is an answer to an action for malicious prosecution against the person on whose information the justice has acted.—*Lea* v. *Charrington*, L.R. 23 Q.B.D. 45.

Market:—

(vii.) **Ch. D. & Q. B. D.**—*Disturbing Market.*—By the Abergavenny Improvement Act, 1871 (incorporating the Market and Fair Clauses Act, 1847), if any persons sell within the town tollable market articles

except on "premises in the occupation of such persons" the Commissioners may levy tolls on such articles as if they had been sold in the market. The defendant sold by auction tollable articles on a piece of land which he occupied. *Held*, that he was not liable to an injunction for disturbing the market. *Held*, also, that he was not liable to the penalty under the Markets and Fairs Clauses Act, 1847, sec. 13, for selling tollable articles otherwise than in his "dwelling place or shop."—*Abergavenny Improvement Commissioners* v. *Straker*, 60 L.T. 756.

Master and Servant:—

(i.) **Q. B. D.**—*Liability for Act of Servant—Scope of Authority.*—Where there was a lavatory provided for the use of the defendant's clerks, and one of them, in using it, negligently left a tap open, so that the water escaped and damaged the plaintiff's goods, *held*, that the use by the clerk of the lavatory was an incident to his employment, and that his master was liable for his negligence.—*Ruddiman* v. *Smith*, 60 L.T. 708; 37 W.R. 528.

(ii.) **Q. B. D.**—*Negligence of Servant—Criminal Liability of Master—Smoke Nuisance (Metropolis) Act*, 1853.—The defendant's furnace was constructed so as to consume its own smoke if properly used, but owing to the carelessness of a stoker failed to do so. *Held*, that the defendant was not criminally responsible for his servant's negligence.—*Chisholm* v. *Doulton*, L.R. 22 Q.B.D. 736; 58 L.J. M.C. 133.

(iii.) **Q. B. D.**—*Wages—Deduction—Fines—Truck Act.*—The deduction from their wages of fines incurred by artificers is not an offence against the Truck Act.—*Redgrave* v. *Kelly*, 37 W.R. 543.

Metropolitan Building Acts:—

(iv.) **Q. B. D.**—*Projection into Street—Shop Front—Power of Vestry—57 Geo. III., c. xxix., s. 72—18 & 19 Vict., c. 122, s. 26, sub-ss. 2, 15.*—The vestry can, under the powers of the Metropolitan Improvement Act, 1817, order the removal of a projection which is found inconvenient to the public, notwithstanding the provisions of the Metropolitan Building Act, 1855, sec. 26, sub-sec. 20.—*St. Mary, Islington (Vestry of)* v. *Goodman*, 58 L.J. M.C. 122.

Metropolis Management:—

(v.) **Q. B. D.**—*Paving New Street—Recovery of Costs—Instalments—Metropolis Management Act*, 1855, *s.* 105—*Metropolis Management Amendment Act*, 1862, *s.* 77—*Summary Jurisdiction Act*, 1848, *s.* 11.—Where a district board have paved a new street, and have accepted payment of the amount apportioned in respect of any house by instalments, summary proceedings may be taken to recover any instalment, provided the information is laid within six calendar months of the demand for the same; although a previous application for the whole sum apportioned may have been made more than six months before such information was laid.—*Prescott* v. *Nicholson*, 60 L.T. 563.

Mine:—

(vi.) **C. A.**—*Right of Support—Lord of Manor.*—(*See* Vol. 14, p. 79, iii.) *Held*, that the Inclosure Act gave the lord of the manor power to work the mines under the inclosures so as to let down the surface without paying damages or making compensation.—*Consett Waterworks Co.* v. *Ritson*, L.R. 22 Q.B.D. 702.

(i.) **Q. B. D.**—*Wages—Payment by Weight—Exemption.*—Orders exempting mines from the provisions of sec. 17 of the Coal Mines Regulation Act, 1872, made by a Secretary of State before the passing of the Coal Mines Regulation Act, 1887, are specially preserved and kept in force by secs. 79 and 84 of that Act, unless revoked or altered by a Secretary of State under the provisions of sec. 72 of the same Act, and exempt the mines to which they were granted from the provisions of sec. 12, sub-sec. 1, of the same Act.—*Dickinson* v. *Handsley*, 60 L.T. 567.

Mortgage:—

(ii.) **Ch. D.**—*Consolidation.*—A. mortgaged leaseholds; the mortgage was transferred to X; A. and his partner afterwards mortgaged other leaseholds to X. *Held*, that X. was entitled to consolidate the mortgages as against A.'s legal personal representatives.—*Harris* v. *Tubb*, 60 L.T. 699.

(iii.) **Ch. D.**—*Foreclosure—Costs—Interest on.*—An action by a mortgagor to set aside a mortgage was dismissed with costs, and a foreclosure order made on the mortgagee's counter-claim. *Held*, that interest on the costs of the action ought not to be allowed to the mortgagee as against the estate, though such interest might be payable by the mortgagor personally. The mortgagor having appealed from the judgment, and having been ordered to pay the costs of the appeal, the mortgagee being at liberty to add unpaid costs to his security, *held*, that such costs bore interest as against the estate from the date of the taxing master's certificate. — *Eardley* v. *Knight*, 60 L T. 780; 37 W.R. 704.

(iv.) **C. A.**—*Power of Sale—Unincorporated Building Society—Winding-up—Liquidators—Companies Act, ss.* 92, 95, 96, 199, 203.—Property was mortgaged to the trustees of an unincorporated building society, with a power (on default) for "the said trustees when required by the directors" to sell and give receipts. The society being wound-up as an unregistered company, six of the directors were appointed official liquidators, with power for any two of them to do all the acts required or authorized to be done by the official liquidator. An order was made vesting all the property of the society in such liquidators. Two of the liquidators sold the property in question. *Held*, that the two could not pass the legal estate. *Quære*, whether the power of sale was personal to the trustees, or could be transferred to and exercised by the liquidators.—*In re Ebsworth and Tidy's Contract*, 37 W.R. 657.

(v.) **Ch. D.**—*Reduction of Interest on Punctual Payment—Mortgagee in Possession.*—A proviso in a mortgage for reduction of interest on punctual payment does not apply when the mortgagee is in possession, even if he takes possession by arrangement with the mortgagor, there being no interest in arrear.—*Bright* v. *Campbell*, L.R. 41 Ch. D. 388; 60 L.T. 731.

(vi.) **Ch. D.**—*Sale by Mortgagee—Error in Particulars—Deduction from Purchase Money—Liability.*—A mortgagee, selling under his power of sale, made a mis-statement in the particulars, and after a contract of sale had been entered into the purchaser insisted on and obtained a large deduction from the purchase money in respect of such mis-statement. *Held*, that the mortgagee must account to the mortgagor for the amount so deducted.—*Tomlin* v. *Luce*, 37 W.R. 490.

(vii.) **P. C.**—*Tender—Refusal to Accept—Recovery of Title Deeds.*—When the amount due to a mortgagee is tendered to him, on proper notice, or without notice when none is required, he must accept it, and if he refuses, does so at his own risk; but such tender is not equivalent to payment, nor is such refusal a breach of contract. Therefore when a

mortgagor by deposit tendered the amount due, which was refused by the mortgagee who alleged, contrary to the fact, that a larger sum was due, *held*, that action of detinue for the recovery of the title deeds would not lie.—*Bank of New South Wales* v. *O'Connor*, 60 L.T. 467.

(i.) **Ch. D.**—*Trustee—Fraud—Priority—Costs.*—S. was entitled to the equity of redemption in leaseholds, and in consideration of the plaintiffs releasing a claim against S., he agreed to assign to them such equity. S. assigned his equity to A., a trustee for the plaintiffs. The assignment recited that A. had agreed to purchase the property for £134, and no notice of the trust appeared in the assignment. A. executed a declaration of trust in favour of the plaintiffs, and kept possession of both the assignment and the declaration of trust. A. obtained an advance from the defendants on the security of such equity of redemption. The defendants did not investigate A.'s title, but took from him a statutory declaration that he had not incumbered his interest. *Held*, that the defendants had no charge as against the plaintiffs, and must deliver up to them the deeds in their possession; and that there should be no order as to costs.—*Caritt* v. *Real and Personal Advance Co.*, 37 W.R. 677.

Municipal Election:—

(ii.) **Q. B. D.**—*County Council—Nomination Paper—Usual Signature.*—A proposer signed the nomination paper of a candidate for a county council, "A. B., Junior," which was his usual signature. On the register he was entered "A. B." *Held*, that the nomination was good.—*Gledhill* v. *Crowther*, 58 L.J. Q.B. 327.

(iii.) **Q. B. D.**—*County Council—Nomination Paper—Blank—Municipal Corporations Act*, 1882, *s.* 72—*Local Government Act*, 1888.—The nomination paper of a candidate for a county council election was defective, in that the name of the electoral division, for which a blank was left in the form, had not been filled in. *Held*, that such defect did not invalidate the nomination.—*Marton* v. *Gorrill*, 58 L.J. Q.B. 329.

(iv.) **C. A.**—*Exception from Consequences of Illegal Employment—Appeal—Discretion—Change of Circumstances—Municipal Elections Act*, 1884, *ss.* 13, 20.—The Divisional Court refused to make an order allowing the employment of paid agents at a county council election to be an exception from the provisions of the Act which made the same an illegal employment. The applicant not having been elected appealed. *Held*, that it was a matter for the discretion of the Court below, but that the fact that the applicant had not been elected was a change of circumstances which entitled the Court of Appeal to make the order.—*E. p. Thomas*, 60 L.T. 728.

(v.) **C. A. & Q. B. D.**—*Woman—Disqualification—Knowledge of Electors—Votes Lost—Local Government Act*, 1888, *s.* 2—*Municipal Franchise Act*, 1869, *s.* 9—*Municipal Corporations Act*, 1882, *ss.* 11, 63.—A woman is not capable of sitting as a councillor for a borough or county, and votes given for a woman (her sex being known, and the possibility of her being disqualified having been discussed at the time of the election) will be lost, and the candidate who stood next to her on the poll will be declared elected.—*Beresford-Hope* v. *Sandhurst*, L.R. 23 Q.B.D. 78; 58 L J. Q.B. 316; 37 W.R. 525 & 548.

Naturalization:—

(vi.) **C. A.**—*Alien—Infant—Guardian—Naturalization Act*, 1870, *s.* 7.—(*See* Vol. 13, p. 128, i.) *Held*, on appeal that the question of the infant's nationality need not be decided, as it was not expedient that the Court should appoint a guardian.—*Re Bourgoise*, L.R. 41 Ch. D. 310; 60 L.T. 553; 37 W.R. 563.

Negligence :—

(i.) **Q. B. D.**—*Construction of Sewer—Support for House—Rural Sanitary Authority—Accruer of Cause of Action—Public Health Act,* 1875, *s.* 264.—The defendants, in exercise of statutory powers, constructed in 1883 a sewer under the plaintiff's house, which was built in 1874. In consequence of the defendants' negligence the plaintiff's house was cracked. The cracks became gradually worse, and in 1888 the plaintiff commenced his action. *Held*, that the action was commenced within six months after the accruing of the cause of action. *Held*, also, that the defendants were liable for negligence, although the plaintiff was not entitled to any right of support by way of easement.—*Fairbrother* v. *Bury Rural Sanitary Authority*, 37 W.R. 544.

Nuisance.—*See* Landlord and Tenant, p. 111, i.

Partnership :—

(ii.) **Ch. D.**—*Premium—Dissolution—Return of Premium.*—The plaintiff and defendant entered into partnership, the plaintiff paying a premium. The articles contained provisions for dissolution in case of the misconduct of a partner, but no provision for the return of the premium. The defendant dissolved the partnership, in consequence of the plaintiff's misconduct, and the Court considered that he was justified in so doing. *Held*, that the plaintiff could not claim the return of the premium.—*Yates* v. *Cousins*, 60 L.T. 535.

Poor Law :—

(iii.) **C. A.**—*Rating—Small Tenement—Rating of Owner—Deductions—6 & 7 Wm. IV., c.* 96, *s.* 1.—Decision of Q. B. D. (*see* Vol. **14**, p. 81, vi.) affirmed.—*Smith* v. *Churchwardens of Birmingham*, L.R. 22 Q.B.D. 703.

Power :—

(iv.) **Ch. D.**—*Fraud on—Restitution to Objects—Extent of Liability.*—A. settled his life policy and all bonuses on trust for his children as he should appoint, and in default of appointment equally. He appointed by deed to one of his children, who surrendered the policy, and handed the proceeds to A. The appointment having been set aside as a fraud on the power, *held*, that A.'s estate must make good the whole amount which would have been received at his death if the policy had been kept up.—*Bridger* v. *Deane*, 60 L.T. 384.

(v.) **C. A.**—*Special Power of Appointment—Exercise of—General Devise.*—W. had power to direct by will that the income of the proceeds of sale of land should be paid to his wife for life. He devised all his real estate absolutely, having at the date of the will no real estate of his own. *Held*, that such devise was not an exercise of the power.—*Foulkes* v. *Williams*, 58 L.J. Ch. 451.

Practice :—

(vi.) **C. A.**—*Adding Defendant—R.S.C.,* 1883, *O.* xvi., *r.* 11.—Decision of Q. B. D. (*see* Vol. **14**, p. 82, ii.) reversed.—*Byrne* v. *Brown*, L.R. 22 Q.B.D. 657; 60 L.T. 651.

(vii.) **C. A.**—*Adding Plaintiff—Bonâ Fide Mistake—Terms—R.S.C.,* 1883, *O.* xvi., *r.* 2.—A. and B. were desirous of restraining X. from building contrary to a restrictive covenant entered into by X.'s predecessor in title with their predecessor in title, but, owing to a mistaken belief that the conveyance to B. was prior to the covenant, A. was made sole plaintiff in an action against X. It then appeared that X. had a defence against A. which he would not have had against B., and A. applied for leave to add B. as a plaintiff. *Held*, that leave ought to be given on terms

that if it should appear at the trial that A. could not maintain the action, but that B. could, A. should pay the costs up to the amendment, that B. should have such relief only as if he had commenced the action at the time of the amendment, and that A. should in any event pay the costs of the application.—*Ayscough* v. *Bullar*, L.R. 41 Ch. D. 341; 58 L.J. Ch. 474; 60 L.T. 471; 37 W.R. 529.

(i.) **P. D.**—*Amendment at Trial—Surprise—Offer of Adjournment—New Trial.*—The plaintiff's counsel, at the close of the case for the defendant, who propounded codicils, asked leave to amend by adding a plea of fraud. The Judge allowed the amendment, but offered an adjournment, which the defendant's counsel refused. *Held*, that the amendment was proper, but that the defendant's counsel was not precluded, by his refusal of the adjournment, from arguing that his client was taken by surprise by the evidence on which the plea of fraud was supported, and that there ought to be a new trial.—*Riding* v. *Hawkins*, 37 W.R. 575.

(ii.) **C. A.**—*Appeal—Extension of Time—Erroneous Order for Payment Out of Court.*—A legacy for £500 bequeathed to M., an infant, and a legacy settled on L. and her children, were paid into Court. On a petition on behalf of L., an order was made which by mistake directed the income of the whole fund to be paid to L. On her death the mistake was discovered, and M. applied for leave to appeal from the order, the time having long expired. *Held*, that the proper course was to present a petition, served on the trustees and the legal personal representative of L., asking that notwithstanding the former order, the £500 might be transferred to the account of M.—*Re Dangar*, 60 L.T. 402.

(iii.) **C. A.**—*Appeal—Interlocutory or Final—Award—Motion to Set Aside.*—An appeal from a refusal to set aside an award or to remit it to the umpire for consideration is analogous to an application for a new trial, and ought to be set down in the list of interlocutory appeals.—*In re Delagoa Bay Ry. Co. & Tancred*, 37 W.R. 578.

(iv.) **Ch. D.**—*Company—Winding-up—Security for Costs.*—*Held*, that a domiciled foreigner resident in Scotland, who claimed in the winding-up of a company, must give security for costs.—*Fontaine's Case; in re Howe Machine Co.*, 37 W.R. 680.

(v.) **Q. B. D.**—*Consolidation of Actions—Appeal—Substitution.*—Where by order of Court all the defendants in several actions are bound by the result of a selected action, and the defendant to such action refuses to appeal from the judgment, the Court may substitute another of the defendants for the purpose of appealing.—*Briton Medical and General Life Assurance* v. *Jones*, 60 L.T. 637.

(vi.) **C. A.**—*Costs—Action for Injunction and other Relief—Scale—"Principal Relief"—Rules, August, 1875, O. vi., r. 2.*—Action in the Chancery Division for damages caused to the plaintiff's property by a flood owing to the defendants' dock-wall being of insufficient height. By amendment a claim was added for an injunction to restrain the defendants from allowing the wall to remain of insufficient height. The injunction and damages were granted. *Held*, that the action was really a Common Law action, that the injunction was not the principal relief sought, and that the costs ought to be taxed on the lower scale.—*Rust* v. *Victoria Graving Dock Co.*, 60 L.T. 645.

(vii.) **C. A.**—*Costs—Admiralty Case.*—In an action for damage by collision a defence of inevitable accident was overruled, and judgment given for the plaintiffs. On appeal, the defence was held to be established. *Held*, that the defendants ought to have the costs of the appeal and in the Court below.—*The Monkseaton*, L.R. 14 P.D. 51; 58 L.J. P. 52; 60 L.T. 662; 37 W.R. 523.

(i.) **C. A.**—*Costs—Cross Actions—Set-off—Probable Costs in Second Action.*—*Semble*, that where there are cross-actions intimately connected, the first of which has been decided in favour of one party, A., the other party, B., will be granted a stay of taxation, in order that the costs of such action, and the costs of the other action which has not been decided, may, if A. should be unsuccessful in such other action, be set off against each other. But, *held*, that B.'s application for such stay will not be granted unless made on the occasion of the decision of the first action.—*Automatic Weighing Machine Co.* v. *Combined Weighing and Advertising Machine Co.*, 37 W.R. 636.

(ii.) **Ch. D.**—*Costs—Separate Actions—Solicitor's Lien.*—A. brought two separate actions against B. He won the first and lost the second. Part of the costs in the second action were costs in the Appeal Court; which B. had recovered under an execution issued against A. *Held*, that such costs were costs in the action and that the execution did not prevent A. from setting-off against them the costs of the first action, but that such set-off could not be ordered to the prejudice of the lien of B.'s solicitor for his costs.—*Blakey* v. *Latham*, 60 L.T. 624; 37 W.R. 569.

(iii.) **C. A.**—*Costs—Discontinuance.*—The words "before taking any other proceeding in the action" in R.S.C., 1883, O. xxvi., r. 1, mean before taking any proceeding with the intention of continuing the action, and do not include taking money out of Court which was paid in by the defendant in satisfaction of the claim, nor paying money into Court in satisfaction of a counter-claim.—*Spencer* v. *Watts*, 37 W.R. 676.

(iv.) **H. L.**—*Costs—Jurisdiction to Deprive Successful Party of Costs—Appeal—R.S.C.*, 1883, *O.* lxv., *r.* 1.—Everything for which a party is responsible connected with the institution or conduct of a suit, and calculated to occasion unnecessary litigation and expense, is "good cause" for depriving a successful party of his costs, and where such "good cause" exists, the discretion of the judge as to giving effect to such considerations is not subject to review. But if the judge gives effect to considerations which do not constitute "good cause," he exceeds his jurisdiction, and his decision is subject to review.—*Huxley* v. *West London Extension Railway*, L.R. 14 App. Cas. 26; 58 L.J. Q.B. 305; 60 L.T 642; 37 W.R. 625.

(v.) **Ch. D.**—*Costs—Order on Solicitor Personally to Pay Costs—R.S.C.*, 1883, *O.* lxv., *r.* 5.—On a summons before the chief clerk the plaintiff's solicitor, A., insisted on an objection owing to which the chief clerk adjourned the summons before the Judge. . On such adjourned summons A. did not appear, and the judge ordered A., personally, to pay the costs which were wasted through his non-attendance. *Held*, that such order was authorised and right.—*Barnard* v. *Scoles*, 37 W.R. 668.

(vi.) **Q. B. D.**—*Costs—High Court Scale—Action for less than £50—Official Referee—R.S.C.*, 1883, *O.* lxv., *r.* 12—*County Courts Act*, 1888, *s.* 116.—Action in the High Court for £47. The plaintiff obtained liberty to sign judgment for £45, and the defendant obtained leave to defend as to the balance. The £45 was paid, and the matter referred to the official referee, who gave judgment for the plaintiff for the balance. *Held*, that the plaintiff was entitled to have all his costs taxed on the High Court scale.—*Barker* v. *Hempstead*, L.R. 23, Q.B.D. 8; 60 L.T. 640; 37 W.R. 685.

(vii.) **Q. B. D.** — *County Court Appeal — Judges' Notes — R.S.C.*, 1883, *O.* lix., *r.* 13—*County Courts Act*, 1888, *s.* 121.—It is the duty of the parties, on a county court appeal, to obtain the judge's notes signed by him, and the appeal will not be heard unless copies of such notes are

furnished for the use of the Judges of the High Court.—*MacGrah* v. *Cartwright*, L.R. 23 Q.B.D. 3; 58 L.J. Q.B. 331; 60 L.T. 537 37 W.R. 619.

(i.) **Q. B. D.**—*County Court Appeal—Leave—Interpleader—County Courts Act*, 1888, *ss*, 120, 157.—In a county court action judgment was given for the plaintiffs and execution issued, the value of the goods seized being less than £20. T. claimed the goods, and on the hearing of the interpleader issue he was awarded £15 damages against the plaintiffs and the high bailiff for illegal seizure. *Held*, that the plaintiffs could not appeal without leave.—*Lumb* v. *Teal*, L.R. 22 Q.B.D. 675; 58 L.J. Q.B 298; 60 L.T. 451.

(ii.) **Ch. D.**—*Default of Appearance—Service of Statement of Claim—Filing—R.S.C.*, 1883, *O.* xiii., *r.* 12.—Where a defendant has failed to appear, and the writ and statement of claim have been served on him personally, the statement of claim need not be filed against him.—*Phillips* v. *Kearney*, 58 L.J. Ch. 344.

(iii.) **Q. B. D.**—*Discovery—Bankers' Books—Inspection—Bankers' Books Evidence Act*, 1879, *s.* 7.—On the application by a party to legal proceedings, the judge has power, if he is satisfied that the entries sought to be inspected will be admissible as evidence at the trial, to make an order giving leave to inspect and take copies of entries in the books of a banker, though the order may involve the disclosure of accounts of persons who are not parties to the proceedings.—*Howard* v. *Beall*, L.R. 23 Q.B.D. 1; 60 L.T. 637; 37 W.R. 555.

(iv.) **C. A.**—*Discovery—Patent Action—Production and Inspection of Models —R.S.C.*, 1883, *O.* l., *r.* 3.—The defendants in an action for infringement of a patent alleged prior publication. *Held*, that the defendants could not be ordered to produce for inspection all articles, models, and drawings which they intended to produce at the trial as being or representing the alleged prior publication, such articles, models, and drawings not being in the possession, custody, or power of the defendants or their servants.—*Garrard* v. *Edge*, 58 L.J. Ch. 397; 60 L.T. 557; 37 W.R, 501.

(v.) **P. D.**—*Divorce—Amendment of Petition—Re-service—Formâ Pauperis.* —A wife petitioned for divorce in *formâ pauperis.* The respondent did not appear It was proposed at the hearing to amend the petition with respect to the date of the alleged adultery. *Held*, that the amended petition must be re-served.—*Charter* v. *Charter*, 58 L.J. P. 44.

(vi.) **P. D.**—*Divorce—Counter-Charge—Rebutting Evidence.*—Where a counter-charge of adultery is made against a husband petitioning for divorce, he may reserve all the evidence as to his own adultery until the witnesses in support of the counter-charge have been called, but if he gives his own evidence on that point in the opening he cannot so defer calling his witnesses.—*Jackman* v. *Jackman*, L.R. 14 P.D. 62; 27 W.R. 624.

(vii.) **P. D.**—*Divorce—Co-respondent Dispensed with—No Evidence.*—On a husband's petition for divorce on the ground of adultery, the only evidence of which was the wife's confession, the husband was excused from making the alleged adulterer a co-respondent.—*Gill* v. *Gill*, 60 L.T. 712; 37 W.R. 623.

(viii.) **P. D.**—*Divorce—Motion to Dispense with Citation—Affidavit.*—On a motion to dispense with the citation of any person as a co-respondent, an affidavit by the petitioner is indispensable.—*Drinkwater* v. *Drinkwater*, 60 L.T. 398.

(i.) **P. D.**—*Divorce—Loss of Original Citation.*—In a case where the original citation could not be found at the Registry, and the clerk of the petitioner's solicitor made an affidavit stating that he had served the citation, and lodged the original in the Registry, the Registrar having cross-examined the clerk refused to certify that the case was in order and ready for trial. Leave to proceed was refused, the Court not being satisfied that the citation had ever been served.—*Cridland* v. *Cridland*, 60 L.T. 398.

(ii.) **P. D.**—*Divorce—Undefended Suit—Omission from List of Names of Co-respondents—Postponement of Hearing—Former Petition.*—It is the duty of the petitioner's solicitor to see that the cause is correctly described in the official term list and in the daily cause list. The hearing of a petition where the names of the co-respondents were omitted from such list was postponed; but the case being undefended, the hearing was taken on the following day, the list having been corrected. The Court refused to pronounce a decree where it appeared that a former petition of the same petitioner, which had been struck out some time previously, still remained on the files of the Court.—*Onslow* v. *Onslow*, 60 L.T. 680.

(iii.) **P. D.**—*Evidence—Appeal from Inferior Court—Admiralty.*—In an Admiralty appeal from an inferior Court an application to allow fresh evidence may be made to a single Judge of the Admiralty Division.—*The Eclipse*, L.R. 14 P.D. 71.

(iv.) **Ch. D.**—*Evidence—Summons to Vary.*—On a summons to vary the chief clerk's certificate, evidence adduced at the hearing of the action, but not referred to in the certificate, cannot be considered. When it appears on the evidence referred to in the certificate that such certificate cannot stand, the matter need not be sent back to chambers, but may be disposed of in Court, fresh evidence having been adduced on both sides, and the Court having before it complete materials for the decision of the case.—*Chapman* v. *Miller*, 60 L.T. 634.

(v.) **P. D.** — *Evidence — Divorce—Rehearing.*—On a wife's petition for divorce on the ground of adultery and desertion, the Court held that the adultery was not established, and granted a judicial separation. The petitioner appealed, and a rehearing was ordered. *Held*, that a decree of dissolution would not be granted unless the petitioner subpœnaed a witness who at the previous hearing had negatived the adultery.—*Chambers* v. *Chambers*, 60 L.T. 514.

(vi.) **C. A.**—*Leave to Adduce Fresh Evidence on Appeal.*—Out of fifty-two plaintiffs twelve failed to appear or give evidence at the trial. Judgment was given for the other plaintiffs. The twelve were ordered to pay the costs occasioned by their joinder. They appealed and applied for leave to give evidence at the hearing of the appeal, on the ground that they had been unable to appear at the trial owing to illness and other reasons. *Held*, that leave ought not to be given, as their solicitor ought to have produced them, or to have given such evidence of their inability to appear as would have warranted an adjournment, but that the judgment ought to be without prejudice to their bringing a fresh action.—*Arnison* v. *Smith*, L.R. 41 Ch. D. 98 & 348; 37 W.R. 593.

(vii.) **Q. B. D.**—*Excise Law—Conviction—Appeal—Notice—7 & 8 Geo. IV., c. 53, s. 83—Summary Jurisdiction Acts*, 1879, 1884.—Notice of an appeal against a conviction for an offence against the excise laws given within seven days of the conviction is sufficient.—*Reg.* v. *Glamorganshire Justices*, L.R. 22 Q.B.D. 628; 58 L.J. M.C. 93; 60 L.T. 536; 37 W.R. 493.

(i.) **Ch. D.**—*Foreclosure—Several Mortgagees—Affidavit of Non-payment.*—In a foreclosure action by several mortgagees an affidavit by one of them, to the effect that the mortgage had not been paid to him, or, to the best of his knowledge and belief, to any of the others, is not sufficient. The affidavit must be made by all the mortgagees who are in the jurisdiction.—*Kinnaird* v. *Yorke*, 60 L.T. 380.

(ii.) **C. A.**—*Garnishee Order—Money in Hands of Banker—Excess over Judgment Debt—R.S.C., O.* xlv., *r.* 1.—A judgment creditor of the plaintiff obtained a garnishee order *nisi* against the defendant, a banker, attaching all debts owing or accruing from him to the plaintiff. A sum exceeding the amount of the judgment debt was in the defendant's hands to the credit of the plaintiff's current account. The defendant refused to honour cheques drawn by the plaintiff against the balance over the amount of the judgment debt. *Held*, that the order bound all the moneys in the defendant's hands and that he was not liable for refusing to honour the cheques.—*Rogers* v. *Whiteley*, 37 W.R. 611.

(iii.) **Q. B. D.**—*Interrogatories—Security for Costs—Several Defendants—R.S.C.*, 1883, *O.* xxxi., *r.* 26.—The plaintiffs sued five defendants who all appeared together and delivered one defence. He desired to deliver the same set of interrogatories to all the defendants, requiring some of them to answer certain of the interrogatories and the others to answer the remainder. The master struck out the interrogatories unless the plaintiff gave security for costs for five sets. *Held*, that the form of the order was wrong, as the defendants need not answer until proper security was given; and further that security for one set of interrogatories was sufficient.—*Eder* v. *Attenborough*, L.R. 23 Q.B.D. 130; 58 L.J. Q.B. 311; 60 L.T. 452; 37 W.R. 507.

(iv.) **Ch. D.**—*Guardian ad Litem—Co-defendant—R.S.C.*, 1883, *O.* xiii., *r.* 1.—A guardian *ad litem* to a defendant may, under circumstances rendering it necessary, be appointed at the instance of a co-defendant.—*Johnston* v. *Hill*, L.R. 41 Ch. D. 415.

(v.) **P. D.**—*Legitimacy Declaration Act*, 1858, *s.* 7—*Greek Marriages Act*, 1884—*Petition—Citation of Persons.*—On a petition under the above mentioned statutes, an application should be made to the Registrar to set down the case for hearing, the true state of the case being represented to him. The Registrar will decide whether any person other than the Attorney-General ought to be cited, reserving any case of difficulty for the Court.—*Brinkley* v. *Attorney-General*; *Scaramanga* v. *Attorney-General*, L.R. 14 P.D. 83; 58 L.J. P. 53; 37 W.R. 687.

(vi.) **C. A.**—*Patent—Particulars of Objections.*—A defendant to an action for infringement who disputes the validity of the patent on the ground of want of novelty and anticipation must not, in his particulars of objections, refer to publications on which he relies simply to show that the state of general public knowledge at the time of the patent was such that there was no invention in the patented process. As regards anticipations he must shew distinctly, though not necessarily by page and line, where such anticipations are to be found.—*Holliday* v. *Heppenstall*, L.R. 41 Ch. D. 109; 37 W.R. 662.

(vii.) **P. D.**—*Pleading—Amendment during Trial—Probate.*—In a probate suit where the onus of proof lay on the defendant, the plaintiff obtained leave, after the defendant had been cross-examined and his case had been closed, to amend his pleadings by adding a statement that a codicil in question had been obtained by the defendant's fraudulent misrepresentations, the evidence in support of such statement being confined to matters arising upon the defendant's cross-examination.—*Riding* v. *Hawkins*, L.R. 14 P.D. 56; 58 L.J. P. 48.

(i.) **Q. B. D.**—*Pleading—Libel—Separation of Libel—R.S.C.*, 1883, *O.* xxii., *r.* 1—*Embarrassing.*—In an action for libel the defendant pleaded that the words complained of, except as thereinafter admitted, were fair comment on a matter of public interest, and to the extent of the facts thereafter stated were true in substance and in fact. He set out the facts he relied on as justification, but admitted that the words were not wholly justified, and were not in every respect fair comment, and he brought into Court forty shillings. *Held*, that the defence was embarrassing, and was contrary to Order xxii., r. 1.—*Fleming* v. *Dollar*, 37 W.R. 684.

(ii.) **P. D.**—*Probate—Change of Venue.*—A registrar has no power to make an order changing the venue of a probate suit from the Probate Division to the assizes.—*Lancaster* v. *Brooke*, L.R. 14 P.D. 80; 60 L.T. 680.

(iii.) **Ch. D.**—*Receiver—Mortgage—Mines.*—The Court has jurisdiction, at the instance of mortgagees of collieries held under leases containing working covenants, to appoint a receiver and manager of the property and business, although the business is not specifically referred to in the mortgage securities.—*Campbell* v. *Lloyd's Bank*, 58 L.J. Ch. 424.

(iv.) **Ch. D.**—*Receiver—Security—R.S.C.*, 1883, *O.* l., *r.* 16.—In an action by debenture holders against a company to realise their security, A. was appointed interim receiver, with power to take possession of the property of the company. There was no direction as to his giving security, and he gave none. A. took possession of the property of the company, and was in possession when a judgment creditor levied execution on such property. *Held*, that the receiver was lawfully in possession, and that the execution creditor was not entitled to the goods seized.—*Morrison* v. *Skerne Ironworks Co.*, 60 L.T. 588.

(v.) **Q. B. D.**—*Removal of Pauper—Appeal against Order—Notice—Summary Jurisdiction Acts*, 1848, 1879, 1884.—It is not necessary to give seven days' notice of appeal against a justices' order for removal of a pauper.—*Reg.* v. *Somersetshire Justices*, L.R. 22 Q.B.D. 625; 37 W.R. 492.

(vi.) **C. A.**—*Security for Costs—Claim in Winding-up—Resident in Scotland—Judgments Extension Act*, 1868—*Companies Act*, 1862, *s.* 122.—A claimant in a winding-up resident in Scotland shewed that he had large property in England available for costs. *Held*, that he need not give security. *Quære*, whether an order in a winding-up can be enforced in Scotland or Ireland, and whether a claimant in a winding-up who resides in Scotland or Ireland ought to be ordered to give security.—*Fontaine's Case; in re Howe Machine Co.*, L.R. 41 Ch. D. 118.

(vii.) **Q. B. D.**—*Service of Writ—Foreign Corporation—Companies Act*, 1862, *s.* 62—*R.S.C.*, 1883, *O.* ix., *r.* 8—*O.* xi., *r.* 1 (*e*).—A Scotch corporation having its registered office in Scotland, though carrying on business in England, cannot be served within the jurisdiction.—*Watkins* v. *Scottish Imperial Insurance Co.*, 60 L.T. 639; 37 W.R. 670.

(viii.) **C. A.**—*Service of Writ—Foreign Corporation—Business in England—R.S.C.*, 1883, *O.* ix., *r.* 6.—A writ of summons was issued against a foreign corporation which carried on business in England, and was served on the head officer at the place of business in England. *Held*, that the service was good.—*Haggin* v. *Comptoir D'Escompte de Paris; Mason & Barry* v. *Comptoir D'Escompte de Paris*, 37 W.R. 703.

(ix.) **C. A.**—*Service of Writ—Foreign Partnership—R.S.C.*, 1883, *O.* ix., *r.* 6.—A writ of summons was issued against a foreign partnership, the members of which were foreign subjects residing out of the jurisdiction.

It was served on the manager at the principal place of the business of the firm, which was within the jurisdiction. *Held*, that the service was bad.—*Russell* v. *Cambefort & Co.*, 37 W.R. 701.

(i.) **C. A.**—*Substituted Service—Defendant out of Jurisdiction—Waiver—Irregularity*, *R.S.C.*, 1883, *O.* ii., *rr.* 4, 5; *O.* xi.; *O.* lxx., *rr.* 1, 2.—Where a writ was issued against a defendant who at the time of the issue was out of the jurisdiction, substituted service cannot be obtained, but an order for such substituted service, if made, is only an irregularity which may be waived by the defendant's conduct, and does not render all proceedings consequent on such order void.—*Fry* v. *Moore*, 37 W.R. 565.

(ii.) **C. A.**—*Third Party—Amendment—Costs—R.S.C.*, 1883, *O.* xvi., *r.* 54.—There is jurisdiction to order a third party who is not made a defendant to pay costs, and such order ought to be made where the third party has in reality fought the action against the plaintiff. *Quære*, whether, after judgment, a third party who has appeared but was not made a defendant, can be made a defendant by amendment so that judgment may be given against him.—*Edison & Swan United Electric Co.* v. *Holland*, L.R. 41 Ch. D. 28; 37 W.R. 699.

Principal and Agent:—

(iii.) **Ch. D.**—*Sale on Del Credere Commission—Profit—Non-disclosure of Buyer's Name.*—The plaintiff consigned goods to the defendants for sale on a *del credere* commission. The defendants sold them to M., who was a customer of theirs, and was largely indebted to them. M.'s name was not disclosed to the plaintiff, it not being the usual course of the trade to disclose the buyer's name. The defendants sold the goods again on behalf of M., and made large profits, which were written off the debt due to them from M. The plaintiffs claimed such profits. *Held*, that no unfair dealing had been established, and that the Court would not infer that M.'s indebtedness to the defendants induced them to give the plaintiffs false or misleading advice, and that the action failed.—*Guy* v. *Churchill*, 60 L.T. 740.

Principal and Surety:—

(iv.) **Ch. D.**—*Release of Surety—Time given to Debtor.*—A surety is not released by the creditor giving time to the debtor unless there is a binding contract to give time, capable of being enforced, and made with the debtor himself, and not with a co-surety or other third person. Six sureties guaranteed the payment to a bank of the amount due from a company on its current account not exceeding £25,000. H. paid off £15,000 of the amount due from the company to the bank. It was agreed by all parties, including the sureties, that the bank should hold certain deeds of the company on trust to secure payment by the company to H. of £15,000, and subject thereto to secure the bank's balance not exceeding £10,000, and that the deed of guarantee should be a security to H. for £15,000 in priority to any claim of the bank. *Held*, that the liability of the sureties was not reduced below £25,000. A., B., and C., three of the six sureties, and L., in consideration of the bank giving credit to the company for one year further, guaranteed the company's debt to an amount not exceeding £8,000, the liability of A., B., and C. not to exceed £2,500 each. *Held*, that the guarantee did not release the original sureties, and that A., B., and C. were each liable for £2,500 more than each of the other sureties.—*Clarke* v. *Birley*, L.R. 41 Ch. D. 422.

See Limitations, p. 112, iv.

Public Libraries Act:—

(i.) **Ch. D.**—*Adoption—Voters.*—The persons entitled to vote on the question whether or not the Act should be adopted are the occupiers, whether the rates are, in fact, paid by them or the owners.—*A.-G.* v. *Mayor of Croydon*, 37 W.R. 648.

Railway:—

(ii.) **Ch. D.**—*Surplus Land—"Necessary and Convenient for Traffic."*—H. conveyed land to a railway company, with a covenant by the company that if any part should not within five years be used for the purposes of a station-house, works, and conveniences, "necessary and convenient for traffic," and be so used at the expiration of that time, the company should reconvey or purchase the land on the terms therein mentioned. About 52 perches were used as a garden by the station-master and porters, and about four perches were occupied by a coal shed, let by the company to a coal dealer. *Held*, that the company were not bound to reconvey or purchase such portions. — *Harris* v. *L. & S.W.R.*, 60 L.T. 392.

Rectification of Deeds:—

(iii.) **Ch. D.**—*Settlement—Unusual Clauses—Parental Influence.*—A father and son, tenants for life and in tail, resettled the family estates. The settlement contained some unusual clauses, including a power for the father to create a charge on the property. The son had no independent advice, but no undue influence was exerted by the father. The son brought an action to set aside the settlement. The father at the trial released the power, and a jointure charge was also released. *Held*, that the rest of the settlement was reasonable, and ought not to be set aside.—*Hoblyn* v. *Hoblyn*, L.R. 41 Ch. D. 200; 60 L.T. 499.

Restrictive Covenant:—

(iv.) **Ch. D.**—*Sale in Lots—Mutual Covenants—Sub-division of Lot—Right Against Purchaser of Part of Lot.*—On a sale of an estate in lots the purchaser of each lot entered into covenants with the vendor and the other purchasers restrictive of building. A., a purchaser, mortgaged part of his lot. The mortgagee had notice of the covenant, but no restriction as to the use of the land was expressly imposed on him. The mortgagee foreclosed, and sold the mortgaged land, part of which became vested in B. B. and the purchasers through whom he claimed had notice of the restrictive covenants. *Held*, that A. could not enforce the covenants against B. — *King* v. *Dickeson*, L.R. 40 Ch. D. 596; 58 L.J. Ch. 464; 60 L.T. 785; 37 W.R. 553.

Revenue:—

(v.) **Q. B. D.**—*Contract for Sale of Goodwill—Stamp—Stamp Act*, 1870, *s.* 70, *Schedule.*—An agreement to sell a business and the goodwill on certain conditions precedent being fulfilled, is not chargeable with duty as a "conveyance or transfer on sale."—*Lewis* v. *Commissioners of Inland Revenue*, 37 W.R. 509.

Sea Fishery:—

(vi.) **Q. B. D.**—*Sea Fisheries Act*, 1883—*Offences—Prosecution.*—No one but a sea-fishery officer may prosecute for an offence against the Sea Fisheries Act, 1883. — *Reg.* v. *Cubitt*, L.R. 22 Q.B.D. 622; 58 L.J. M.C. 132; 60 L.T. 638; 37 W.R. 492.

Settlement:—

(i.) **Ch. D.**—*Construction—Next-of-Kin in Blood according to Statutes of Distribution.*—The ultimate limitation in a settlement was for "the next-of-kin in blood of" the settlor "according to the statutes for the distribution of intestates' effects, and in the manner in which the same would have been distributed if he had died possessed thereof intestate." *Held*, that the settlor's widow was excluded.—*In re Fitzgerald*, 37 W.R. 552.

(ii.) **Ch. D.**—*Construction—Limitation to Next-of-Kin—Time for Ascertaining Class.*—The limitation in a marriage settlement after the decease of the husband and wife, was for the persons who under the Statutes of Distribution would then be entitled thereto, in case the wife, having survived the husband, were to die possessed thereof and intestate. The wife predeceased the husband. *Held*, that the class must be ascertained as if the wife had died immediately after the husband.—*Clarke* v. *Hayne*, 37 W.R. 667; *Gibson* v. *Wright*, 60 L.T. 745.

See Rectification of Deeds, p. 125, iii.

Settled Estate:—

(iii.) **Ch. D.**—*Money Representing Land—Investment—Settled Land Act, 1882.*—The proceeds of sale of land sold under the Settled Estates Act, 1877, were under an order of the Court invested in consols in the names of trustees until they could be applied to the purposes mentioned in the Act. *Held*, that the trustees might sell the consols, and invest the proceeds in securities authorised by the Settled Land Act, 1882.—*In re Tennant*, L.R. 40 Ch. D. 594; 58 L.J. Ch. 457; 60 L.T. 488; 37 W.R. 542.

Settled Land:—

(iv.) **Ch. D.**—*Settled Land Act*, 1882, *s.* 21, *sub-s.* 10—*Expenses.*—Trustees contracted under the Settled Land Act to sell a farm which was unlet, the sale to be completed a year after the contract. They applied for leave to raise a sum to carry on the farm in the meantime as part of their "expenses." *Held*, that capital money could not be applied under the Act until it was received, and that future purchase-money could not be charged. Leave granted to renew the application on completion of the sale.—*Round* v. *Turner*, 60 L.T. 379.

(v.) **C. A.**—*Sale by Tenant for Life—Costs of Mortgagee—Settled Land Act, 1882, ss.* 20, 21, 50.—Decision of Ch. D. (*see* Vol. **14**, p. 51, iii.) affirmed.—*Cardigan* v. *Curzon-Howe*, L.R. 41 Ch. D. 375; 58 L.J. Ch. 436; 60 L.T. 723; 37 W.R. 521.

Ship:—

(vi.) **P. D.**—*Charter-Party—Coal—Deviation.*—By a charter-party the owners were to keep the ship and her machinery in good condition, and the charterers were to pay for all coal. If, owing to breakdown or other causes, she was compelled to put into ports other than those to which she was bound, the owners were to pay port charges, pilotage, and other expenses at these ports. Owing to a leak in the condenser, she was compelled to put into a port to which she was not bound, and to take in a quantity of coal there, which was necessary in consequence of the deviation. *Held*, that the owners were not bound to pay for such coal.—*The Durham City*, 58 L.J. P. 46.

(i.) **P. C.**—*Collision—Exceptional Current—Liability.*—Where a steamship under way collided with a ship at anchor owing to the effect of an exceptional current, known to be a possible though improbable contingency, and it was shewn that one of the steamship's anchors was not ready, and that there was a delay in dropping the other, *held*, that ordinary precautions had been neglected and that the steamship was to blame.—*The City of Pekin*, L.R. 14 App. Cas. 40; 58 L.J. P.C. 64.

(ii.) **C. A.**—*Collision—Regulations for Preventing Collisions at Sea, Arts.* 14 (*a*), 22, 23.—Where a ship is bound to keep out of the way of a second ship which is bound to keep her course, such second ship ought not to keep her course after it appears that the first ship is about to cross her bows at such a distance as to make a collision probable.—*The Tasmania*, L.R. 14 P.D. 53; 60 L.T. 692; 37 W.R. 352.

(iii.) **P. D.**—*Collision—Fog—Speed—Helm.*—If a steamer in a fog cannot reduce her speed sufficiently without occasionally stopping her engines, they must be stopped. When those in charge of a steamer hear a steamer's whistle in a fog, on either bow, but not so broad that it may be inferred that she will clear their vessel, they must not alter their course until the other vessel is seen.—*The Resolution*, 60 L.T. 430.

(iv.) **P. D.**—*Collision—Sailing Ships—Close Hauled—Luffing.*—A vessel close-hauled, but rather off the wind, ought not to luff to the extent of 2½ points when approaching a vessel which ought to keep out of her way.—*The Earl Wemyss*, 60 L.T. 431.

(v.) **P. D.**—*Collision—Stern-Light.*—A white light carried continuously at the stern of a ship which is visible astern and over an arc of the horizon of more than six points on each quarter of the ship, is not such a light as is required by the Regulations to be shewn by an overtaken ship. Where a sailing vessel carrying such a light was run into by a steamer which approached in such a manner that both the side-light and the stern-light were visible, *held*, that the sailing ship was to blame. —*The Imbro*, L.R. 14 P.D. 81; 58 L.J. P. 49; 37 W.R. 559.

(vi.) **P. D.**—*Collision—Steam Trawler.*—A steam trawler with her trawl down and with only sufficient way on to keep her under command was shewing the lights provided by the Order in Council. *Held*, that a sailing ship was bound to keep out of her way.—*The Tweedsdale*, 58 L.J. P. 41.

(vii.) **P. D.**—*Collision—Limitation of Liability—Stay of Proceedings.*—In an action of limitation of liability the plaintiffs claimed a stay of all proceedings on paying into Court a sum representing £8 per ton in respect of damages to ship and goods, and on giving security for the difference between £8 and £15 in respect of claims for personal injuries and loss of life. *Held*, that proceedings might be stayed in respect of claims for damages to ship and goods, but not in respect of claims for personal injuries and loss of life.—*The Nereid*, L.R. 14 P.D. 78; 58 L.J. P. 51; 37 W.R. 688.

(viii.) **Q. B. D.**—*Insurance—"Improper Navigation"—"Improper Stowage."* —The planking of a ship's hold having been saturated by leakage from a cargo, was not properly cleaned before a new cargo was stowed and such cargo was consequently damaged. *Held*, that this was not "improper navigation" within the meaning of the rules of a mutual insurance company. *Semble*, that it was "improper" stowage.—*Canada Shipping Co.* v. *British Shipowners' Mutual Protecting Association*, L.R. 22 Q.B.D. 727; 58 L.J. Q.B. 343.

(i.) **C. A.**—*Insurance—Average—General Average.*—Decision of Q. B. D. (*see* Vol. **14**, p. 20, vii.) affirmed.—*Price* v. 100 *A* 1 *Ship's Small Damage Assurance Association*, L.R. 22 Q.B.D. 580; 58 L.J. Q.B. 269; 37 W.R. 566.

(ii.) **Q. B. D.**—*Merchant Shipping Act*, 1854, *s.* 318—*Passenger Steamer.*—A steamer which gratuitously carries a party of persons on a pleasure trip, without going to sea, is not thereby made a passenger steamer, and is not "plying" as such.—*Hedges* v. *Hooker*, 37 W.R. 491.

Solicitor:—

(iii.) **Ch. D.**—*Agreement as to Costs—Validity.*—A client, a gentleman's valet, instructed a solicitor to act on his behalf in the completion of the purchase of a business for £500. A number of letters were written, and, according to the solicitor's account, nearly thirty interviews were held, and other business was done. An agreement was signed that the bill of costs (without being made up to date) should be £12. The client alleged that he acted in ignorance and under pressure. *Held*, that the bargain was unfair and invalid.—*Mearns* v. *Knapp*, 37 W.R. 585.

(iv.) **C. A.**—*Costs—Scale—Leases—General Order, Clause* 2, *Sub-ss.* (*b*) (*c*); *Sched.* 1, *part* 2.—Where a lessor employs a solicitor to see to the letting of premises, negotiations with persons other than the person who takes the lease are not covered by the scale fee, but are chargeable for as "business not completed."—*Re Martin*, L.R. 41 Ch. D. 381; 58 L.J. Ch. 478; 60 L.T. 555; 37 W.R. 497.

(v.) **Ch. D.**—*Costs—Scale Charge—Compulsory Sale—Easement—Pending Business—General Order*, 1882, *r.* 6, *Sched.* 1, *r.* 11—*Solicitors' Remuneration Act*, 1881, *s.* 7.—In a case of a purchase under compulsory powers, the purchaser's cost are chargeable according to the scale. The costs of the purchase of an easement are not so chargeable. Where business was wholly completed before the general order came into effect the costs are chargeable according to the scale. Where business was pending at that date, and the solicitor gave notice that he would charge according to the old system, such notice was effectual where no work was done between the said date and the date of the notice, but not where any work was done between such dates.—*In re Stewart*, 60 L.T. 737; 37 W.R. 484.

(vi.) **Q. B. D.**—*Costs—Taxation—Payment of Probate Duty.*—The payment of probate duty by a solicitor instructed to take out probate for a client is properly included in his bill of costs as a disbursement.—*In re Lamb*, L.R. 23 Q.B.D. 5; 37 W.R. 506.

(vii.) **C. A.**—*Taxation—Bill Delivered Twelve Months—Death of Client—Attorneys and Solicitors Act*, 1843, *s.* 37.—Decision of Ch. D. (*see* Vol. **14**, p. 94, i.) affirmed.—*Cole* v. *Park*, L.R. 41 Ch. D. 326.

(viii.) **Ch. D.**—*Lien for Costs—Compromise of Action—Money in Court—Notice of Lien.*—The defendant in an action paid £50 into Court. The plaintiff, after the close of the pleadings and notice of trial, without the knowledge of his solicitor, agreed with the defendant and his solicitors, that the plaintiff should receive the £50 in discharge of all his claims, and that the defendant should do what was necessary to enable him to obtain the £50. The plaintiff signed a notice of his intention to appear in person. The plaintiff's solicitor gave the defendant's solicitor notice not to pay the plaintiff any money until his costs had been paid. The defendant's solicitor then obtained payment of the £50, and paid it to the plaintiff.

Held, that the £50 was subject to a lien for the costs of the plaintiff's solicitor; that the plaintiff and the defendant's solicitor having had notice of such lien were liable for the £50; but that the defendant was not liable, having had no notice, and having received no money.—*Ross* v. *Buxton*, 58 L.J. Ch. 442; 60 L.T. 630.

(i.) **C. A. & Q. B. D.**—*Goodwill—Sale of—Possession of Client's Papers—Arbitration—Revocation of Submission*—3 & 4 *Will. IV.*, *c.* 42, *s.* 39.—A transfer of the business premises and goodwill of a solicitor's business does not include the right to the possession of papers of clients stored on the premises. The Court will not, except under special circumstances revoke a submission to arbitration.—*James* v. *James*, L.R. 22 Q.B.D. 669; L.R. 23 Q.B.D. 12; 58 L.J. Q.B. 300; 60 L.T. 569; 37 W.R. 495 and 600.

(ii.) **Ch. D.**—*Negligence—Fund in Court—Erroneous Order—Liability.*—A legacy of £500 bequeathed to M., an infant, and a legacy of £7,000 settled on trust for L. and her children, were paid into Court by the trustees, on separate occasions, but to the same account. L. petitioned to have her legacy carried to a separate account, and to have the dividends paid to her. The petition did not state that the fund in Court represented two legacies, and the amount proposed to be dealt with was stated in blank, and in consequence the whole fund was transferred to L.'s account, and the dividends paid to her during her life. The solicitor who acted for the trustees also acted for the petitioner, and had the carriage of the whole proceedings. After L.'s death M. attained twenty-one, and petitioned for payment of her legacy with accumulated interest. *Held*, that L.'s estate was primarily liable to refund the dividends erroneously paid to her, and that, failing her estate, the solicitor must personally make good the deficiency, and pay all the costs caused by the mistake.—*In re Dangar's Trusts*, L.R. 41 Ch. D. 178; 58 L.J. Ch. 315; 60 L.T. 491; 37 W.R. 651.

(iii.) **C. A. & Q. B. D.**—*Suspension—Application to Strike off the Rolls.*—A solicitor was suspended for misappropriation of moneys. He was afterwards convicted of embezzlement in respect of such misappropriation. Application was made to strike him off the rolls merely on the ground of the conviction for the felony, the facts being the same as before, and having all been before the Court. *Held*, that he ought not to be struck off the rolls.—*E. p. The Incorporated Law Society ; In re A Solicitor*, 37 W.R. 574 and 598.

(iv.) **C. A.**—*Striking off the Rolls—Application to Re-admit—Jurisdiction—Solicitors Act*, 1843, *s.* 32.—When an order has been made to strike a solicitor off the Rolls for an offence under section 32 of the Solicitors Act, 1843, there is no jurisdiction for any Court or Judge to re-admit him as a solicitor—*In re Lamb*, 37 W.R. 665.

See Bankruptcy, p. 101, v., vi. Practice, p. 119, ii.

Specific Performance:—

(v.) **Ch. D.**—*Lease—Usual Covenants.*—Where there is an open contract to take a lease, and the liability of the lessee to deliver up the premises in good repair is excluded in the case of fire, it ought not to be further restricted by the insertion of the words "or other casualty."—*Crosse* v. *Morgan*, 60 L.T. 703; 37 W.R. 543.

Subrogation.—*See* Trustee, p. 131, iv.

Tenant Par Autre Vie:—

(i.) **Ch. D.**—*Executory Devise—Cestui que Vie—6 Anne, c.* 18.—The devisee of land in case of the death of another without leaving issue is a person who has a claim in expectancy to an estate after the death of a person within the meaning of 6 Anne, c. 18. Land was devised to M. in fee, but in case she should die without leaving lawful issue, to others. M.'s interest was sold to A. M. married and left her husband, having had no issue. He died in May, 1888. Orders were made that A. should produce M., first at W. church-door, and secondly in Court; she was not produced, and A. did not prove her to be alive. *Held*, that she must be deemed to be dead.—*E. p. Baker: in re Pople*, L.R. 40 Ch. D. 589; 58 L.J. Ch. 372; 60 L.T. 668; 37 W.R. 554.

Trade Mark:—

(ii.) **Ch. D.**—*Abandonment—Evidence of Intention—Patents, Designs, and Trade Marks Act*, 1883, *s.* 64, *sub-s.* 3.—Application to register "Emollio" as a trade mark in respect of "an article of perfumery." The applicant's father, who died in 1867, had used the word on labels in connection with a perfumed cream. It was doubtful whether after his death there had been any sale of the article. In 1870 the applicant destroyed all the labels which had the word on them, and it was not used subsequently upon any perfumed cream. After 1881 the applicant sold a tablet in boxes on which was inscribed "Emollio Tablet." *Held*, that the use of the word as a trade mark previously to 1875 had been abandoned.—*In re Grossmith's Trade Mark "Emollio,"* 60 L.T. 612.

(iii.) **C. A.**—*Name of Place—Rectification of Register.*—Decision of Ch. D. (*see* Vol. **14**, p. 95, iii.) affirmed.—*Thompson* v. *Montgomery*, L.R. 41 Ch. D. 35; 58 L.J. Ch. 374; 60 L.T. 766; 37 W.R. 637.

(iv.) **Ch. D.**—*Prior User—Patents, Designs, & Trade Marks Act*, 1883, *s.* 73. —D. applied to register trade marks for baking powder, a conspicuous part of which was the words "Fruit Salt." E. opposed on the ground of his prior user of the term "Fruit Salt" for a saline préparation, he having registered the words as a trade mark, claiming a user prior to August 13th, 1875. D. applied to remove E.'s trade mark from the register. To this E. assented, not being able to prove use of the words before August 13th, 1875, except as part of a label. D. admitted knowledge of E.'s exclusive use of the words before he adopted them. *Held*, that D.'s trade marks ought not to be registered.—*Re Eno & Dunn; Trade Mark "Fruit Salt,"* 60 L.T. 414.

(v.) **C. A.**—*Registration—Similarity to Mark already Registered—Same Goods—Calculated to Deceive—Costs—Patents, Designs, & Trade Marks Act*, 1883, *ss.* 62, 69, 72, 73, 90.—The comptroller has a discretion as to whether a trade mark, having regard to sections 72 and 73, and otherwise, ought to be registered. A mark so nearly resembling one already registered in respect of the same goods or description of goods as to be calculated to deceive cannot be registered. Goods, although in the same class under the Schedule to the rules as those in respect of which there is already a registered mark are not necessarily the "same goods or description of goods," and goods not in the same class as goods in respect of which there is already a registered mark may nevertheless be the "same goods or description of goods." If the Court is applied to to compel the comptroller to register, the Court has a discretion to refuse the application independently of section 72, and although the case is not within the section.—*Semble*, spirits are the "same description" of goods as wines. Where a person has successfully opposed the registration of a

mark, there is no jurisdiction to give him his costs incurred before the comptroller, but it is for the taxing master to say whether they are included in the costs of the proceedings.—*Re Australian Wine Importers; Trade Mark, Golden Fleece*, L.R. 41 Ch. D. 278; 58 L.J. Ch. 380; 60 L.T. 436; 37 W.R. 578.

Trespass :—

(i.) **C. A.**—*Tramway—Defective Line—Running Powers.*—The plaintiff was injured by the defendants' tramcar being thrown against him owing to the defective condition of the line. The defendants were not owners of the line, but had running powers over it, and were not aware of its defective condition. *Held*, that the defendants were liable in trespass. —*Sadler* v. *South Staffordshire & Birmingham Tramways Co.*, L.R. 23 Q.B.D. 17; 37 W.R. 582.

Trustee :—

(ii.) **Ch. D.**—*Investment—Depreciated Security—Difference Between Trustees.* —Where the security for a mortgage, held by trustees, which was originally a proper investment, has depreciated in value, so that the margin is less than would be proper in the case of a fresh investment, it is not the duty of the trustees immediately to call in the loan, but to consider, as men of business, what is the proper course to adopt, considering, amongst other matters, the risk of having the mortgaged property thrown on their hands. If there is such a difference of opinion between them that they cannot exercise their discretion the Court will assist them.—*Eland* v. *Medland*, 60 L.T. 781.

(iii.) **Ch. D.**—*Breach of Trust—Investment—Sale of Stock—Liability to Replace.*—Where trustees sell stock part of the trust funds for the purpose of making an improper investment, they are liable, at the option of the *cestui-que trusts*, either to replace the stock or to refund the proceeds of sale.—*Clark* v. *Trelawney*, 60 L.T. 620.

(iv.) **Ch. D.**—*Power to Mortgage—"Full or Valuable Consideration"—Subrogation.*—A. died in 1866, having appointed his two sons (his partners) trustees and executors. He gave £5,000 in trust for his daughters, charged on all his estate, and empowered the trustees to retain it in their business as long as they might reasonably require or wish. He gave his residue to his sons, and declared that if they should sell or charge any part of the real estate for "full or valuable consideration" it should not be liable, in the hands of the purchasers, to the legacy. A. and his sons had freehold premises as tenants in common, subject to a mortgage to P. In 1878 the sons mortgaged the premises to R. to secure past and future advances, no fresh advance being made at the time. Out of past advances the sons had paid off P.'s mortgage without any stipulation to that effect by R., and had taken a reconveyance to themselves. Other parts of the advances had been expended in extending the business. *Held*, that the mortgage to R. was not for "full and valuable consideration," and that it had not priority over the charge of the legacy, but that R. was entitled to stand as first mortgagee to the extent of P.'s mortgage.—*Redman* v. *Rymer*, 60 L.T. 385.

(v.) **Ch. D.**—*Rendering Accounts—Expenses.*—When trustees are required by a person claiming to be a *cestui-que trust* to furnish accounts and give information respecting the estate, they are entitled to be guaranteed against the expenses of so doing; and this rule is not affected by the fact that one of the trustees is a solicitor.—*Martin* v. *Lamb*, 58 L.J. Ch. 432.

See Mortgage, p. 116, i.

Vendor and Purchaser :–

(i.) **C. A.**—*Contract to Purchase at a Valuation—Interest—Damages.*—The defendant agreed with the plaintiff, his tenant of a mill, to purchase at a valuation, at the expiration of the tenancy, some machinery which the plaintiff was setting up in the mill, nothing being said about interest on the purchase-money. The tenancy expired at Michaelmas, 1885, and the plaintiff remained in possession rent free as a caretaker till Lady Day, 1886. The defendant having refused to purchase the machinery the plaintiff commenced an action for specific performance, not specifically claiming either interest or damages. *Held*, that the plaintiff, having obtained an order that the defendant should pay for the machinery at a valuation made by the official referee, was entitled, by way of damages for delay, to interest at the rate of £4 per cent. on the valuation from Lady Day, 1886.—*Marsh* v. *Jones*, L.R. 40 Ch.D. 563; 60 L.T. 610.

(ii.) **Ch. D.**—*Costs Occasioned by Mortgage—Production of Deeds—Concurrence of Mortgagee—Conveyancing Act*, 1881, *s.* 3, *sub-ss.* 6 *&* 9.—A contract for sale of land "free from incumbrances," provided that the vendor and "all other necessary parties" should convey, and that "such assurance, and every other act and thing required by the purchaser for perfecting or completing the vendor's title or otherwise" should be "prepared, obtained, made, and done at the expense of the purchaser." The vendor had mortgaged the property. *Held*, that the purchaser must pay the expense of the production of deeds in the possession of the mortgagee, and of the concurrence of the mortgagee in the conveyance. *Re Willett and Argenti*, 60 L.T. 735

(iii.) **Ch. D.**—*Mistake in Particulars—Condition—Compensation.*—The purchaser contracted to buy premises, which he occupied, relying on a valuation shewn by the vendor, which described the premises as containing 1,244 square yards. The contract described the premises as containing about 1,200 square yards, and provided that compensation should be allowed in case of error or mistake in the description. It afterwards appeared that the premises contained only 935 square yards. Neither vendor nor purchaser knew the actual area. *Held*, on summons, that the purchaser was entitled to a reference as to what deduction should be allowed.—*Aspinalls to Powell and Scholefield*, 60 L.T. 595.

(iv.) **Ch. D.**—*Right to Rescind—Unwilling.*—Vendors, the trustees of a building society, passed a resolution that they were unwilling to comply with a purchaser's requisitions, and rescinded the contract, under a condition providing that they might do so in case the purchaser should make any requisition which they should be unable or unwilling to comply with. *Held*, that the right to rescind arose directly on the making of the requisitions, that the vendors were not bound to give any reasons for rescinding, and the onus of proving caprice or *mala fides* in so doing was on the purchaser.—*In re Starr Bowkett Building Society and Sibun's Contract*, 58 L.J. Ch. 459.

(v.) **C. A.**—*Sale of Life Interest—Restrictive Covenants—Tithe Rent-Charge—Apportionment.*—E., the trustee in bankruptcy of the tenant for life of a house and some cottages, contracted to sell the life interest of the bankrupt in such property; the property was subject to covenants restrictive of its user which were not disclosed to the purchaser. *Held*, that as the purchaser would be able to sell the fee simple of the property, the restrictive covenants would be injurious to him, and that a good title was not shewn. A small piece of the property had formed part of a field the whole of which was subject to an entire sum as tithe rent-

charge. *Held*, that E. was under no obligation to have the rent-charge apportioned, or to pay the expenses of apportionment.—*In re Ebsworth & Tidy's Contract*, 37 W.R. 657.

(i.) **Ch. D.**—*Vendor's Lien—Volunteer—Leaseholds.*—In the case of leaseholds the vendor's lien for unpaid purchase-money is not good as against a volunteer claiming under the purchaser.—*Harris* v. *Tubb*, 58 L.J. Ch. 434; 60 L.T. 699.

Voluntary Settlement:—

(ii.) **P. C.**—*Conveyance for Value by Settlor—Administrator—Breach of Trust.*—A. conveyed real estate in Victoria to his wife by a voluntary settlement. She died intestate, and A. obtained administration in his marital right. He afterwards purported to convey the real estate for value. *Held*, in a suit against A. by the next-of-kin of the wife, that if such conveyance was not a *bonâ fide* conveyance for value, it did not defeat the voluntary settlement; and that if it was a conveyance for value, it was a breach of trust on the part of the administrator, and that in either case he was liable to account to the next-of-kin.—*Harding* v. *Howell*, 60 L.T. 578.

Waste:—

(iii.) **Ch. D.**—*Permissive—Tenant for Life.*—A remainder man has no claim against the assets of a deceased tenant for life for permissive waste to the settled property.—*Aris* v. *Newman*, 37 W.R. 612.

Will:—

(iv.) **Ch. D.**—*Accumulations—Thellusson's Act.*—A testator bequeathed a sum of consols on trust to pay the dividends of specified sums, making up the whole sum, to different annuitants for their lives, and directed the dividends set free by the deaths of the annuitants to be accumulated till the death of the last of them, when he gave the principal sum and accumulations to A. He gave his residue to five persons, of whom A. was one. On the death of an annuitant who was entitled to the dividends on £500 consols, A. applied for the transfer to him of such £500. *Held*, that the dividends on the £500 from the expiration of 21 years from the testator's death till the death of the surviving annuitant belonged to the residuary legatees, as undisposed of, and that A. was not immediately entitled to the whole of the £500, but, being one of the residuary legatees, was entitled to one-fifth thereof.—*Powell* v. *Parry*, 60 L.T. 490.

(v.) **Ch.**—*Construction—Executory Trust—Direction to Settle.*—Bequest on trust for children who, being daughters, should attain twenty-one or marry, with a direction that if a daughter should marry, and, during minority, with certain consents, her share should be assigned to trustees on trust for her for life, and after her death for the use of her intended husband for life, and then to the children of the "marriage or respective marriages in such manner as is hereinbefore directed as to my own children," with a gift over if any daughter died without issue. A daughter married while a minor, and she and her husband covenanted to assign her property on certain trusts when she should come of age. The husband died and she married again, when a settlement was executed giving the second husband a life interest. There was one child of the first marriage, who attained twenty-one and died intestate and a bachelor, and there were no children of the second marriage. The testator's daughter being dead, *held*, that under the will there was power to give a life interest to the second husband.—*Nash* v. *Allen*, 37 W.R. 646.

(i.) **C. A.**—*Construction—Perpetuity—Class Gift.*—A bequest on trust for accumulation during the minority of the youngest of the testator's grandchildren living at his decease; with a direction that as soon as "such grandchildren" should attain twenty-one, the fund should be "for all and every" the testator's "grandchildren then living who being a son or sons should attain twenty-one to be divided between them equally." There was a proviso that "if any grandchild shall die, leaving a child or children who, being a son or sons, shall attain twenty-one," such child or children should take their parent's share. *Held*, that the last gift applied only to the children of grandchildren dying before the period of distribution, and was not void for remoteness.—*James* v. *Cordey*, 37 W.R. 609.

(ii.) **Ch. D.**—*Construction—Surviving—Other—Accrued Share.*—Bequest of a fund on trust to pay the income equally among the four nieces of the testatrix during their respective lives, and after the decease of any of them, to pay the principal of her share among her children. And in case any of the said nieces should die without having children, the share of such niece was given in trust to pay the same to her surviving sisters and their respective children in the same manner as was directed respecting their original shares. *Held*, that "surviving" meant "other," and that on the death of a niece without children, her share was divisible between the two survivors and the children of one who had previously died; but that the share so accruing to one of the survivors would, on her death without children, fall into the residue.—*Whytehead* v. *Bolton*, 37 W.R. 583.

(iii.) **Ch. D.**—*Construction—Survivor.*—A testator directed a sufficient investment in consols to provide specified annuities for his wife and his four children *nominatim*: upon the death of the wife her annuity to be distributed among the children for their lives: upon "the decease of either of my said children" one fourth of the said fund of consols was bequeathed to the children of such deceased child: in the event of "either of my said children" dying without issue the fourth share "to which the children of such dying (*sic*) would have been entitled" was bequeathed unto the "survivors of my said children." There was a residuary bequest. *Held*, that X., the longest liver of the four children, having died without issue, was absolutely entitled to his one-fourth share of the consols, and consequently, that it passed to his representatives.—*Morrell* v. *Gissing*, L.R. 41 Ch. D. 409; 58 L.J. Ch. 439.

(iv.) **Ch. D.**—*Construction—Share of Residue to Sink into Residue—"To be Settled."*—Bequest of £10,000 in trust for testator's daughter E. for life, with remainder for her children, and in default one-fifth to E.'s appointees and four-fifths to "sink into and form part of my residuary estate." There was a similar bequest in favour of a daughter M. The residue was bequeathed to all the testator's children equally, the shares of daughters "to be settled on the same trusts as their respective sums of £10,000 hereinbefore given." E. died without issue having appointed one-fifth of her £10,000. *Held*, that the words "to be settled" created an executory trust, and that E.'s share of the residue was not undisposed of but must go among the other residuary legatees.—*Ballance* v. *Lampshier*, 37 W.R. 600.

(v.) **Ch. D.**—*General Bequest—Power of Revocation in Settlement—Exercise of—Wills Act, s. 27.*—A testator made a general bequest of his personal estate. He afterwards executed a settlement by which he declared that the trustees of the settlement should hold a fund on trust to deal with the same in such manner as the settlor should by any writing or writings,

revocable or irrevocable "but not by his last will and testament, or any codicil thereto, unless he should expressly refer to the said trust fund and premises, order and direct, by which writing or writings the trusts of the said indenture might be absolutely revoked, annulled, varied, or otherwise dealt with." *Held*, that the general bequest in the will did not operate as an exercise of the power of revocation and new appointment.—*Charles* v. *Burke*, 60 L.T. 380; *Robinson* v. *Burke* L.R. 41 Ch. D. 417; 58 L.J. Ch. 448; 37 W.R. 504.

(i.) **P. D.**—*Inconsistent Testamentary Documents—Parol Evidence.*—There were two testamentary documents, the second did not in terms revoke the former, but dealt with all the testator's property. *Held*, that probate must be given to the second only, parol evidence to prove that it was meant as a codicil being rejected.—*In the Goods of Palmer*, 58 L.J. P. 44.

(ii.) **Q. B. D.**—*Proviso against Alienation—Bankruptcy.*—Bequest to A. of an annuity and of a life interest in a share of the residue. There was a proviso that A. should "not have power to alienate, charge, incumber or dispose of" the annuity, or the income of the share of the residue, and there were directions as to such annuity and income in the event of his "alienating, charging, incumbering, and disposing of the same." *Held*, that the bankruptcy of A. did not effect a forfeiture.—*E. p. Pelley; in re Harvey*, 60 L.T. 710; 37 W.R. 620.

(iii.) **P. D.**—*Probate—Destruction under Erroneous Impression.*—A duly executed codicil was by the direction of the testatrix torn up under the erroneous impression that it was made void owing to a verbal transposition, and the torn pieces were by her direction copied, but owing to her illness, such copy was not executed. *Held*, that probate of the codicil should be granted.—*In the Goods of Thornton*, L.R. 14 P.D. 82; 37 W.R. 624.

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